SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 274.

A. T. GERLINGER and E. A. GERLINGER,
Plaintiffs in Error,

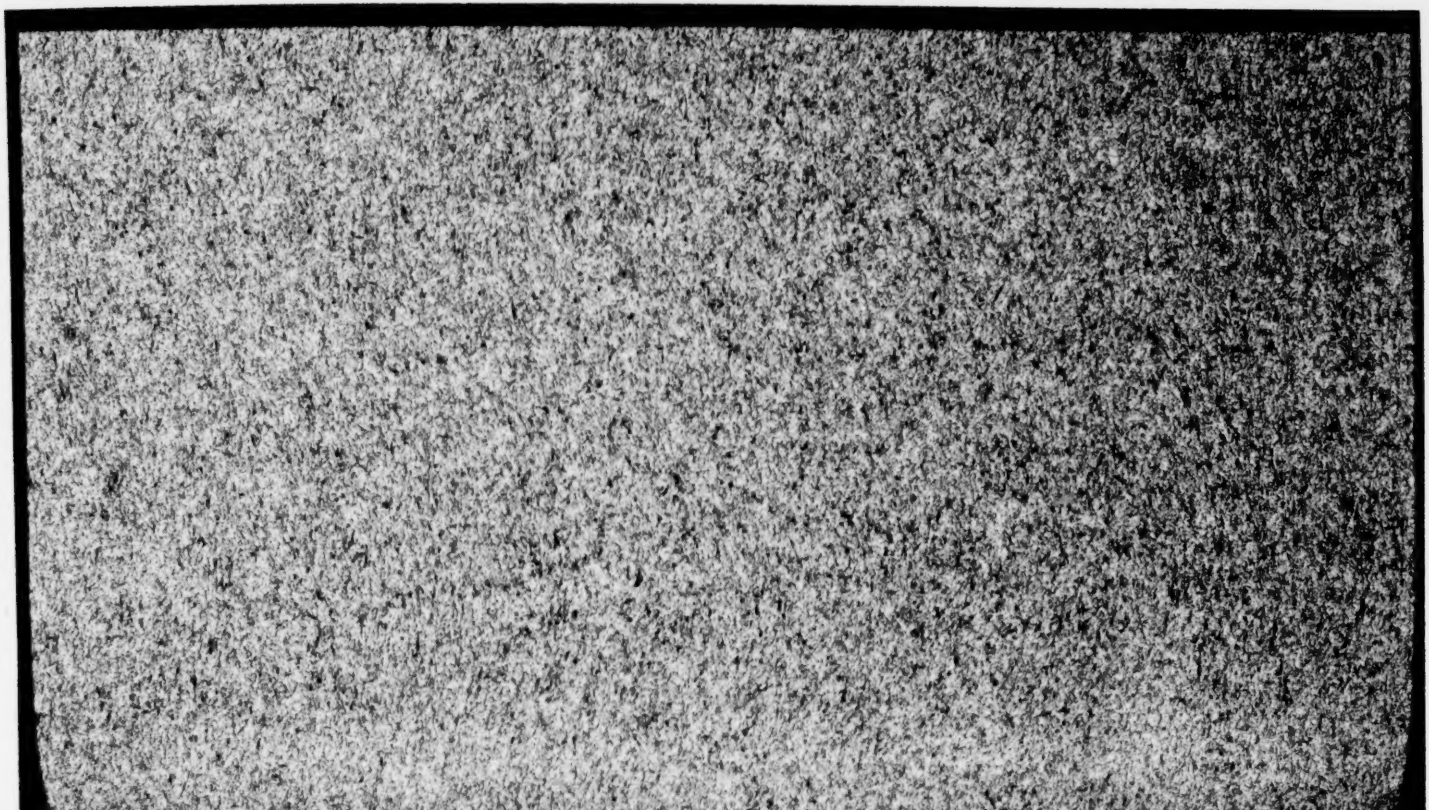
vs.

K. G. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

L. L. Coey,
Attorney and Counsel for Defendants in Error.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1904.

No. 171.

A. Y. CHRISMAN and H. T. CHRISMAN,
Plaintiffs in Error,

vs.

E. O. MILLER and THE HOME OIL COMPANY,
Defendants in Error.

In Error to the Supreme Court of the State of California.

BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

This is an action brought originally in the Superior Court of the County of Fresno, State of California to quiet title to the northeast quarter of section 20, in township 19 south range 15 east, M. D. B. & M.

The plaintiffs in error herein, the defendants in that action, A. Y. Chrisman and H. T. Chrisman, filed a joint answer, each claiming a specific twenty acres of the tract mentioned in the complaint of the defendants in error. All the

parties claimed the land under and by virtue of locations, alleged to have been made by them thereon, under the laws of the United States regulating the sale and disposition of the mineral lands of the United States. A judgment was rendered in the lower court in favor of the defendants in error, all the material facts in the controversy being found and established by that Court in favor of these defendants in error. Upon appeal to the Supreme Court of the State, the judgment of the lower court, and its findings of fact, were approved and affirmed.

1.

STATEMENT OF THE CASE.

The trial of this action was had before the court, sitting without a jury, and the findings of the court are full and complete upon every controverted issue of fact, and by reference to them the history of the case will be disclosed. From them it will be seen that the court has found the following ultimate facts:

That E. O. Miller, one of the defendants in error, is the owner of the land in controversy.

Record, page 21.

That the other defendant in error, as the lessee of said property, at the commencement of the action, was in the actual possession of every part of said territory. That A. Y. Chrisman and H. T. Chrisman, the plaintiffs in error, claimed an interest in said property, adverse to the defendants in error, but that their claim is without right.

Record, page 22.

That on the 31st day of December, 1896, the property in controversy was a portion of the public domain of the United States and open to exploration and location for mining purposes under the laws of the United States.

Record, page 22.

That said land was, and is, chiefly valuable for the petroleum and other oils contained therein.

Record, page 23.

That on the 31st day of December, 1896, E. O. Miller and seven associates, each of them being citizens of the United States and over the age of twenty-one years, as an association of persons, made a mineral location upon said northeast quarter of said section 20 by posting upon said land

a notice of location, and they thereupon marked said location upon the ground so that the boundaries thereof could be readily traced.

Record, page 23.

That on the 31st day of July, 1897, J. A. Hannah and six of the other co-locators, for a valuable consideration, transferred unto the defendant in error, E. O. Miller, all of their right, title, interest, estate and ownership in and to said property, and all their right, title, interest, estate and ownership owned under or by virtue of said mineral location, and that on September 17th, 1897, E. O. Miller did lease unto Frank Barrett said premises, that Frank Barrett, thereupon went into possession of the same under the terms of said lease, and on said day, did transfer his leasehold interest to the defendant in error, The Home Oil Company, and that the latter Company went into the *immediate possession of all of said property and ever since has been, and now is, in the exclusive possession of all thereof.*

Record, page 23.

That immediately after going into possession of said quarter section, the Home Oil Company commenced the development of said territory and expended therein the sum of more than $30,000.00, and by means of its operations discovered large quantities of petroleum therein, and there now exists, and did exist at the commencement of this action, wells of great depth sunk and excavated upon said property by said lessee, from which there is a daily flow of large quantities of petroleum of great value.

Record, page 24.

That on January 1st, 1897, the date of the alleged locations made by the plaintiffs in error herein, no portion of

said territory was open to exploration or location for mining purposes under the laws of the United States.

Record, page 24.

That on said first day of January, 1897, the plaintiffs in error herein, A. Y. Chrisman and H. T. Chrisman, each did enter upon a portion of said quarter section, and each attempted to make a location thereon of twenty acres for mineral and mining purposes.

Record, pages 24, 25.

That neither A. Y. Chrisman nor H. T. Chrisman, at any time, discovered a seepage of petroleum, or other mineral oil upon said land, or any part thereof, and that the only discovery of petroleum, or any other fluid product upon said land, or any part thereof, was the discovery made by the Home Oil Company.

Record, page 25.

That on said first day of January, 1897, all of said quarter section was in the possession of E. O. Miller and his seven co-locators under and by virtue of their location, as found by the court.

Record, page 25.

That the plaintiffs in error, A. Y. Chrisman and H. T. Chrisman, did not make their alleged locations for mining purposes in good faith, and that neither of them did enter into the possession of any part of the territory for the purpose of working or mining the same at any time, and they have not, nor has either of them, at any time, done or performed upon said land, or any part thereof, such work and labor, or made improvements thereon as required by the laws of the United States.

Record, page 25.

That on the 14th day of June, 1895, certain persons, viz: Frank Barrett and others, pretended to make upon said quarter section, a mineral location which was called the King Petroleum Mining Claim; that subsequently said alleged locators did make, execute and deliver to the Producers' and Consumers' Oil Company a deed of their interest in said land, and that thereafter, and on December 24th, 1896, said corporation made, executed and delivered unto E. O. Miller a quit claim deed to its interest in the property, and that on the 31st day of December, 1896, said E. O. Miller abandoned and relinquished his interest therein so acquired to the United States of America.

Record, page 26.

That on said 14th day of June, 1895, the said Frank Barrett and the other persons attempting to make said locations, other than A. Barieau, were not citizens of the United States, or qualified to make a mineral location under the laws of the United States, and said persons did not, in fact, make any such mineral location on said date, and that said parties have not, nor has either one of them, nor the said Producers' and Consumers' Oil Company, nor the said E. O. Miller, ever had or held any right, title, interest, claim, possession, or right of possession in or to said property, or any part thereof, under said attempted location, or under said deeds of conveyance.

Record, page 27.

That the allegations contained in paragraphs 1, 2, 3, 4, 5, and 6 of the third further and separate defense, of the plaintiffs in error herein, are not true.

Record, pages 13, 14, 15, 27.

2.

CONTENTIONS OF THE DEFENDANTS IN ERROR.

Defendants in error contend:

(a). That the asserted contentions of the plaintiffs in error, numbered I, II, III, IV, V, and VI, being all of the propositions upon which the plaintiffs in error rely, are entirely dependent for their solution upon the determination of questions of fact, and the findings of fact of the trial court, affirmed by the Supreme Court of the State of California, are conclusive upon this Court, and are determinative of all the questions raised by the plaintiffs in error in support of the writ of error.

(b). That the decision of this case in favor of the defendants in error by the trial court and the Supreme Court of the State of California was correct, and the judgment of the Supreme Court should be affirmed.

(c). That this court has no jurisdiction to hear or determine this controversy for the reason that no Federal question was ever specially set up or claimed by these plaintiffs in error in the courtsof the State of California, and that the decision of the Supreme Court of the State of California was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

3.

PRESENTATION OF THE ARGUMENT.

(a) That the asserted contentions of the plaintiffs in error, numbered I, II, III, IV, V and VI, being all of the propositions upon which the plaintiffs in error rely, are entirely dependent for their solution upon the determination of questions of fact, and that the findings of fact of the trial court, affirmed by the Supreme Court of the State of California, are conclusive upon this Court, and are determinative of all the questions raised by the plaintiffs in error in support of the writ of error.

We understand the rule to be elementary and well settled that the findings of fact of the trial court, affirmed by the Supreme Court, are conclusive and final, and that all the facts so found will be taken as true upon this hearing. The contentions of the plaintiffs in error referred to will be found upon pages 6 to 8, inclusive, of their brief.

In the case of Minneapolis & St. Louis R. Co. v. Minnesota *ex rel* Railroad & W. Com., 193 U. S. 53, Justice McKenna, after quoting the findings of the lower court, said:

"The finding, like the verdict of a jury, is conclusive in this court. Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452. It follows that the order of the Warehouse Commission was not an unreasonable requirement, and the judgment is affirmed."

In the leading and very important case of Clipper Min. Co. v. Eli Min. & L. Co., 194 U. S. 220, the same question

was up for consideration; in the course of its decision, the court said:

"It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review conclusions of the highest court of a state upon questions of fact. Republican River Bridge Co. v. Kansas P. R. Co. 92 U. S. 315, 23 L. ed. 515; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Noble v. Mitchell, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S. 673-677, 42 L. ed. 320, 321; 17 Sup. Ct. Rep. 922; Turner v. New York, 168 U. S. 90-95, 42 L. ed. 392-394, 18 Sup. Ct. Rep. 38; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300. It must, therefore, be accepted that the Searl placer claim was duly located, that the annual labor required by law had been performed up to the time of the litigation, and that there was a subsisting valid placer location, and that the lodes were discovered by their locators within the boundaries of the placer claim subsequently to its location. So the trial court specifically found, and its finding was approved by the supreme court. * * *

"The difficulty with the case presented by the plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespasses, and as a general rule no one can initiate a right by means of a trespass. Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Trenouth v. San Francisco 100 U. S. 251, 25 L. ed. 626; Haws v. *Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282. See also Cosmos Exploration Co. v. Gray Eagle Co.

61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, in which the court said (L. R. A. p. 242, C. C. A. p. 93, Fed. p. 17):

'No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200, 202; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579, 24, L. ed. 1130, 1132; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Mower v. Fletcher, 116 U. S. 380, 385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; Nickals v. Winn, 17 Nev, 188, 193, 30 Pac. 435; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588, 17 Pac. 705; Rourke v. McNally, 98 Cal. 291, 35 Pac. 62.'

"If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts, or otherwise, is undoubtedly a trespass, and such trespass cannot be relied upon to sustain a claim of a right to veins or lodes."

In the case of Thayer v. Spratt, 189 U. S. 346, Mr. Justice Peckham, speaking for the court, says:

"But, however this may be, we are precluded by the finding of facts in the state court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against the evidence or the weight of evidence. Egan v. Hart, 165 U. S., 188, 41 L. ed. 680, 17 Sup. Ct. Rep., 300; Gardner v. Bonestall, 180 U. S., 362, 370, 45 L. ed., 574, 577, 21 Sup. Ct. Rep., 399; Bement & Sons v. National Harrow Co., 186 U. S., 70,

46 L. ed., 1058, 22 Sup. Ct. Rep., 747; Jenkins v. Neff, 186 U. S., 230, 235, 46 L. ed., 1140, 1143, 22 Sup. Ct. Rep., 905."

In the case of Jenkins v. Neff, 186 U. S., 230, it is held:

"Further, although there is in the record quite an amount of testimony as to the assets and business of trust companies in Brooklyn, yet the case was determined by the supreme and appellate courts of New York upon findings of fact,—which findings do not sustain the contention of the plaintiffs in error in this respect,—and it is well settled that the findings of fact in the state court are on a writ of error conclusive with us. Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S., 673, 677, 42 L. ed., 320, 321, 17 Sup. Ct. Rep., 922, and cases cited therein; E. Bement & Sons v. National Harrow Co., 186 U. S., 70; *ante*, 1058, 22 Sup. Ct. Rep., 747a. In other words, we apply the law to the facts settled in the State courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

In the case of E. Bement & Sons v. National Harrow Co., 186 U. S., 70, it is said:

"In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. Dower v. Richards, 151 U. S., 658, 666, 38 L. ed., 305, 308, 14 Sup. Ct. Rep., 452; Israel v. Arthur, 152 U. S., 355, 38 L. ed., 474, 14 Sup. Ct. Rep., 583; Egan v. Hart, 165 U. S., 188, 41 L. ed., 680, 17 Sup. Ct. Rep., 300; Hedrick v. Atchison, T. & S. F. R. Co., 167 U. S., 673, 677, 42 L. ed., 320, 321, 17 Sup. Ct. Rep., 922."

In the case of Egan v. Hart, 165 U. S., 188, it was said:

"On error, however, to a State court, this court cannot re-examine the evidence, and, when the facts are found below, is concluded by such finding. Dower v. Richards, 151 U. S., 658; Bartlett v. Lockwood, 160 U. S., 357; Stanley v. Schwably, 162 U. S., 255, 278. True, it is that in Dower v. Richards the court (referring to the dictum in Republican River Bridge Co. v. Kansas Pacific Railway, 92 U. S., 315, 317), treated as open for further consideration the question whether, in chancery cases, the power existed in this court to review the decision of state courts on both the law and the fact. We, however, conclude that not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such findings. The adjudications are collected very fully in Dower v. Richards and in the subsequent cases referred to."

In the light of these decisions, the plaintiffs in error are precluded from presenting for the consideration of this court any of their contentions specified upon pages 6 to 8, inclusive, of their brief, as all of these contentions are based upon disputed questions of fact, all of which have been resolved in favor of these defendants in error.

As we understand the present situation in this case, this court and counsel in the presentation and determination of this case must concede and assume the following as the ascertained and determined facts in this case:

(1.) That the location by Barieau and others, upon the 14th day of June, 1895, was not a valid location, and did not divest the land of its status as part of the public domain

and did not appropriate it to private claim or domain at any time.

Record, pages 26, 27, 122.

The reference is to the findings of the trial court where it is found that the co-locators, with Barieau, were not citizens of the United States, or qualified to make a mineral location under its laws, and that no such mineral location was, in fact, made on June 14th, 1895, upon any portion of the property in controversy.

The decision of the Supreme court upon this question is, in part, as follows:

"If, however, the Barieau location was not a valid location, as the court finds, then the lands were open to notorious, peaceable, and *bona fide* entry by others for the purpose of initiating a new location. The findings of the court, as has been said, were against the validity of the Barieau location."

"Without discussing other grounds of objection made to that location, we are satisfied that it was invalid for at least one reason. Barieau and his co-locators did not at the time of their attempted location, nor ever, make any discovery of mineral upon the land."

(2.) That the abandonment by E. O. Miller, on December 31st, 1896, was invalid and inoperative and of no effect, not because it was made with any intent to re-locate the property, but because the Barieau location, being invalid, there was nothing for E. O. Miller to abandon. This is the second contention presented by the plaintiffs in error.

(Page 6 of their brief.)

As we have seen, the findings of the trial court were that no such location was made, as was attempted to be abandoned

by E. O. Miller, and that the attempted abandonment was not made for the purpose of avoiding the necessity of doing the assessment work.

Record, page 29.

Upon these questions, the Supreme Court says:

"And first it is insisted that the location is invalid because Miller, prior to his location, but upon the same day executed an abandonment to the Government of all rights under the Barieau location, and it is contended that this invalidated the location subsequently made, because such pretended abandonment was not made in good faith, but designed as a fraud upon the United States to evade the performance of the assessment work required by law. But the answer to this is that the court, upon sufficient evidence, finds against this contention, and, furthermore, as the Barieau location was itself invalid, there was no occasion for an abandonment of it, because there was nothing to abandon."

(3.) That the location made by E. O. Miller and others on December 31st, 1896, was invalid, and that there was not at that time any valid, subsisting location on the land, and that the land was open to exploration and location; that it was based on a discovery, and that no rights to third parties had attached to the property before a discovery had been made, and that the location, in fact, was not made by Miller, Hall and Hannah alone, and that the other five co-locators were not mere dummies. The findings of the trial court are full and explicit upon these questions.

Record, pages 23 to 30.

Upon these questions the decision of the Supreme court is as follows:

"So, too, the evidence warrants the finding of the court

that the persons named as co-locators in the Miller location were *bona fide* locators, and that the location was made for the benefit of them all. Likewise, upon sufficient evidence, the court's finding negatives the charge of fraud, collusion and conspiracy upon the part of these locators."

"It is disclosed by the evidence that Miller, his associates and lessees remained in possession of the land, and with diligence and great expense prosecuted the work of boring wells. This work finally resulted in success, oil was discovered in paying quantities, and the land became extremely valuable. Plaintiffs thus, not only made a discovery, but are the ones of all the alleged co-locators who have done so."

(4.) That the land, on the first day of January, 1897, was not open to exploration and location at the time the plaintiffs in error attempted to make their locations thereon, and that the attempted location made by Barieau never did lapse for the reason that no location was ever made.

This is the fourth contention presented on behalf of the plaintiffs in error.

These facts, being so found, are sufficient to dispose of the fourth contention presented by the plaintiffs in error.

(Brief, page 7.)

(5.) That the locations attempted to be made by the plaintiffs in error were not valid locations, and were not followed up by the doing of any of the things required by law in order to make a valid mining location of the premises.

The court's finding in that behalf, is that the plaintiffs in error never, at any time, discovered a seepage of petroleum, or other mineral oil upon their respective lands sought to be so located, and that upon the date of their alleged locations, no part of said premises was vacant and public mineral land, or open to exploration or location for mining purposes, but

was in the possession of E. O. Miller and his co-locators, and that the plaintiffs in error did not make their respective locations in good faith, or entered into the possession of their alleged locations, and have never done any work or labor thereon.

Record, page 25.

In other words, the facts upon which the contentions of the plaintiffs in error are based, and which are now presented for the consideration of this court, are found adversely to their contentions, and are not questions of law which can again be re-argued and presented to this court. The record establishes conclusively, upon sufficient facts, that at the time E. O. Miller and his co-locators located this quarter section, it was vacant, unappropriated public land of the United States; that their location was properly made, and the boundaries thereof were marked so the same could be readily traced, and that an actual discovery of mineral was made thereon under that location, and that the land was not open to exploration and location when these plaintiffs in error attempted to make their respective locations, but that it was at the time in the actual possession of E. O. Miller and his associates; that the plaintiffs in error never, at any time, made any discovery of mineral thereon, and never entered into the possession thereof, or did any work thereunder as required by the laws of the United States, or otherwise.

These facts being taken as true, it necessarily follows, that the plaintiffs in error were mere trespassers, and that the location, under which the defendants in error claim was a valid and subsisting location and vested in them a possessory right, which was superior in every way to any asserted claim on the part of these plaintiffs in error. Upon these facts alone the judgment of the Supreme Court of the State of California should be affirmed.

(b) That the decision of this case in favor of the defendants in error by the trial court and the Supreme Court of the State of California was correct, and the judgment of the Supreme Court should be affirmed.

From our theory of the case it would seem quite unnecessary to present for the consideration of the court the arguments made on behalf of these defendants in error in the courts of California in support of their contentions upon the merits in this case, in view of the fact that these contentions upon controverted and disputed questions of fact, were determined in their favor.

The plaintiffs in error have seen fit to attempt to again re-argue, in their brief, the merits of this case upon these questions of fact, quite as elaborately and as earnestly as though all of these facts were open for the consideration of this court. As counsel for the plaintiffs in error has seen fit to re-argue the entire case upon the theory that these questions of fact were again open for discussion, out of an excess of caution we deem it best to submit to this court our views in opposition thereto.

The property involved in this location is very valuable. It is "oil land" in the Coalinga district, situated in Fresno county, and it was upon this identical land that among the very first valuable discoveries of petroleum in the State of California were made, and was practically the genesis and beginning of the oil industry in that state, which has now assumed large proportions. The record shows that these discoveries were made by the labor and capital of the defendants in error, and that the value which this property now possesses has been established as the result of their industry and courage.

The plaintiffs in error claim to have located upon a portion of this quarter section on January first, 1897. This action was instituted by the plaintiffs on the 14th day of October, 1898. During this interval of nearly two years, the defendants in error were engaged in the honest and earnest endeavor to develop this property. It was during this time that they expended the money, performed the labor and made the discovery shown by the record. By this expenditure of money and the performance of this labor within the limits of the quarter section they, for the first time, established the fact that the land is most valuable and *worth litigation*, although these plaintiffs in error have not, at any time, seemed to think that it was worth any labor or the expenditure of their money in its development.

The briefs submitted on behalf of the plaintiffs in error show great learning and industry, but in our opinion much of it is quite unnecessary and pedantic. In their brief they pile up a large citation of authorities to establish legal propositions which are so fundamental that no one would think of denying them, and which, in fact, tend to support the case of the defendants in error. A multitude of these authorities announce legal propositions correct in themselves but which have no bearing upon any matter to be determined here, and in this brief counsel *assume as facts* facts which are directly in the teeth of the findings of the court, and which are without any sort of support from the evidence.

Upon the record of this case we assert, on the part of the defendants in error upon the merits of this case, the following contentions:

(1) *The location made by A. Baricau and others on June 14th, 1895, was absolutely void and not sufficient to segregate*

the land from the public domain of the United States, nor to prevent a valid location being made on the land prior to the 1st day of January, 1897.

The plaintiffs in error introduced some testimony in an effort to prove that one A. Barieau, for himself and seven others, under the laws for the exploration and disposition of the mineral lands of the United States, on the 14th day of June, 1895, made a location upon all of the land claimed by defendants in error.

We wish here to call the court's attention to the fact that the plaintiffs in error attempted to prove this location by the testimony of Barieau alone. It is not pretended that any person was with Barieau at the time he made this alleged location, or that any one, save Barieau, did any act on June 14th, 1895, towards making such a location. Nor is it claimed that the notice of location which Barieau testified that he posted on the land was ever seen by any human eye excepting his own.

The court saw fit to disbelieve the testimony of Mr. Barieau; the court did not think proper to take from the defendants in error property, worth thousands of dollars, and turn it over to the plaintiffs in error upon the unsupported testimony of this witness. That the court was entirely correct in its refusal to do so is very apparent from the record in this case.

Let it be remembered that the plaintiffs in error claim no right in themselves under this pretended location, made by Barieau in June, 1895. Their claim is under another and different location made by themselves on the 1st day of January, 1897. The significance claimed for this Barieau location is no more than this: That it operated to segregate the lands from the public domain of the United States, and, by itself,

without any other act being done, prevented a location being made on the land in question prior to the 1st day of January, 1897.

Now, we admit, without reservation or qualification, and in all its length and breadth, the proposition that a valid existing location upon mineral lands will, during all the year in which it was made and during all of the succeeding year, operate to prevent any other mineral locations upon the same land, and that any such attempted location is absolutely void. We are surprised to find that counsel deem it necessary to argue a proposition so fundamental in its character, and to burden their briefs with citations of authorities in support of a point which it is impossible for any one to deny.

We take issue with counsel, not upon the law, but upon the facts. We say that Barieau did not make any such location as he pretends, and that such a location never at any time existed. The court has so found, and the evidence is amply sufficient to support the findings of the court.

1. Barieau's attempted location was utterly void, because his alleged co-locators, Frank Barrett, J. W. Brown, James McLean, James E. Campbell, James A. McClurg, Hart H. Barrett and J. J. Bright, were not citizens of the United States, and were not qualified to make a mineral location under the laws of the United States and of the laws of the State of California.

2. Barieau did not make any discovery of mineral upon the land.

3. The boundaries of the claim were not distinctly marked upon the ground so that they could be readily traced.

4. The attempted location was made for an association of persons, and was made by Barieau without any such association having been first previously formed and without the

knowledge of any of the persons constituting such pretended association.

The right to explore and locate the mineral lands of the United States is confined to citizens of the United States, or those persons who have declared their intentions to become citizens.

U. S. Rev. Statutes, Section 2319.

North Noonday Mining Co. v. Oriental Mining Co., 1st Fed. Rep., 522.

Wood, et al., v. Aspen Mining & Smelting Co., 36 Fed. Rep., 25.

O'Riley v. Campbell, 116 U. S. Rep., 418.

In Billings, et al., v. Aspen Mining & Smelting Co., 51 Fed. Rep., 338, and 52 Fed. Rep., 250, in the Circuit Court of Appeals, 8th Circuit, District of Colorado, distinguishes O'Riley v. Campbell, *supra,* but that was a case where the party who sought to defeat the claims of an alien's heirs, on the ground of the alienage of their ancestor, was himself a co-locator with the alien and claimed under the location.

In the State of California it has long been held to be the law that no one not a citizen, or person who has declared his intention to become such, could acquire any right in the mineral lands of the United States. It has been explicitly so decided by this court upon several occasions.

LeDoon v. Tesch, 68 Cal., 43.

Anthony v. Jillson, 83 Cal., 296.

Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal., 100.

(2) *The alleged Baricau location was utterly void because not based upon any discovery of minerals within the limits of the lands located.*

It was hardly necessary for counsel for plaintiffs in error

to cite authorities in support of the proposition that a valid location must be based upon a discovery of mineral within the limits of the lands located. Such is the undoubted law. Discovery lies at the very basis of the right of location and a right of location is most certainly dependent upon it; or perhaps it would be more correct to say, that discovery of mineral is part and parcel of the act of location.

We now apply this admitted principle to this alleged Barieau location and submit that it clearly appears from the evidence that his alleged location was not based upon any discovery of mineral, and that, in fact, he never made any such discovery at all.

Let it be borne in mind that this alleged discovery, like every other matter and thing necessary to the validity of his alleged location, depends entirely upon the testimony of Barieau. We think the trial court was justified in doing what we believe it did do, that is, put his testimony entirely out of the case. But if his testimony should be taken as true it is very far from being sufficient to establish a discovery. Counsel say, in speaking of Barieau, "He made a discovery of petroleum or oil on the land in question." Mr. Barieau does not say so. He says:

Record, page 65:

"At the time I posted the notice I had been over the land in question very much of the entire northeast quarter and had discovered *indications of* petroleum thereon. I made the discovery near the east line of the northeast quarter."

And at,

Record, page 68,

he speaks of the indications of oil he discovered on this northeast quarter in June, 1895. He says, "There is a spring there and the oil comes out and floats over the water in the

summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water was coming out; it was dripping over a rock about two feet high; there was no pool, it was just dripping, a little water and oil, not much water."

It will be observed that the witness does not pretend that he made any explorations of the land by digging, or any sort of excavations whatever, and that the labor performed and the exploration made by him consisted only in walking over the land.

Now, indications of oil are not oil; discovery of the indication of a thing is not the discovery of the thing itself. Discovery of reason for believing in the existence of a certain fact is not knowledge of the fact itself.

As between rival locators of mineral land the courts have been liberal in fixing the requirements of a valid discovery; but even under the liberal rule as thus established, defendants are very far from proving any discovery upon which to base the Barieau location. There is, however, some slight difficulty in applying the rule as announced by the courts, for the reason that in almost all, and in fact, we believe in every case, where the requirements of a valid discovery were discussed the question arose upon contending *lode* locations, that is, locations upon "rock in place." The court is here concerned with an alleged placer location and, perhaps, it will be somewhat difficult to apply the rule founded upon the facts alleged in support of a placer location to the facts alleged in support of lode location. However, all rules of law are founded upon certain principles, and when the principles upon which the rule is established are clearly apprehended there will be little difficulty in applying the rule.

A mineral discovery sufficient to warrant the location of

a mining claim, may be regarded as proven where mineral is found, and the evidence shows that a person of ordinary prudence would be justified in the FURTHER expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

Harrison v. Chambers, 1st Pac. Rep., 362.

Shreve v. Copper Bell M. Co., 28 Pac. Rep., 315.

Let it be observed that the discovery here spoken of is a discovery *resulting from the expenditure of the locator's labor and means.*

In the matter of this alleged location, there is no evidence that he expended any labor or means in making his alleged discovery; but there is affirmative evidence that he did not, and there is no evidence proving the significance of these alleged "indications" found by Barieau, or enabling the court to determine whether or not, upon those indications, a person of ordinary prudence would be justified in the expenditure of his labor and means. The court cannot say as a matter of law, nor can the court make any presumption of the fact, that the "indications" mentioned afforded any sort of evidence or proof of the existence of a body of petroleum within the limits of the claim located.

In the case of Harrison v. Chambers, 1st Pac. Rep., 362, *supra*, it is said that expert testimony is admissible to show that a claim contains certain veins as the miners discovering it would be likely to follow with reasonable expectations of finding paying ore. In this case there is no such testimony introduced by the plaintiffs in error; upon the contrary, expert testimony was introduced by the defendants in error by which it was shown that the "indications" spoken of by Barieau, so far as showing the existence of petroleum within

the claims as located, were, in fact, evidence of the existence of petroleum at a place beyond and above the claim.

Record, pages 96, 97.

"It is the finding of the mineral in rock in place as distinguished from float rock that constitutes the discovery and warrants the prospectors in making a location of a mining claim."

Book v. Justice M. Co., 58 Fed. Rep., 106.

"Mere discovery of fragments of mineral bearing ore not in lode formation will not form the basis of a valid location of a lode claim."

Waterloo M. Co. v. Doe, 56 Fed. Rep., 685.

This is undoubtedly correct, and the reason is obvious; the discovery of these fragments would be no sort of evidence of the existence of mineral rock in place; in other words, no evidence of the existence of mineral *within the limits of the claim.*

Now, Barieau says that these "indications" which he discovered *were in motion;* "there was a little water with oil and a little oil with water coming out." This would be no better evidence of the existence of oil within the limits of the location than was the finding of fragments of mineral rock evidence of the existence of a lode within the location. The facts must show that the location was made in good faith, and not simply upon a conjecture or imaginary existence of a vein or lode which cannot be permitted.

Locations existing simply upon a conjecture or imaginary existence of a vein or lode within their limits shall not be permitted. *A location can only rest upon an actual discovery of the vein or lode.*

King v. Mining Co., 152 U. S., 227.

We quote now from a leading authority which we believe very succinctly announces the true rule:

"These indications were of such character that miners in that district would follow in the expectation of finding ore and such as would justify miners in working the claim for that purpose. The rock in these seams was different from the country rock, and was of such character as was designated by the witnesses, who were practical miners, as 'a vein containing rock in place bearing minerals.' These facts show that the location was made in good faith and not simply upon a conjectural or imaginary existence of a vein or lode which cannot be permitted. The seams containing mineral bearing rock which were discovered before the location was made were similar in their character to the seams or vein of mineral matter that had induced other miners to locate claims in the same district, which, by continued development thereon, had resulted in the establishment of the fact that the seams, as depth was obtained thereon, were found to be a part of a well defined lode or vein containing ore of great value. The discovery made at the time of the Kerby location was, therefore, such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located."

Shoshone M. Co. v. Rutter, 87 Fed. Rep., 801-807.

In the case now before the court, there is no evidence that the "indications" discovered by Barieau were of such a character as the miners in that district would follow, and there is no evidence that these "indications" would justify miners in working the claim, and there is no evidence that practical miners ever had or ever would attach any significance to these indications, and there is no evidence that indications of similar character had ever been followed up by any persons

whatever or had ever resulted in the finding or development of a petroleum claim.

Mr. Lindley, in his excellent work on Mines, says correctly that the tendency of the courts is toward marked liberality of construction where a quesion arises between two miners, and he cites many cases showing the tendency of the courts towards that liberality. He also marks the lines beyond which the court will not go.

"But an expectation is something more than a hope. A location made in the hope of finding some ore in it at some time is worthless unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein."

And again he says: "While the courts may not be enabled to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and counterfeit, the real and the sham."

1st Lindley on Mines, Sec. 336, p. 436.

We think the court will have little difficulty in finding that the discovery, alleged to have been made on the 15th day of June, 1895, was counterfeit and not genuine, sham and not real.

3. *The Baricau location was not distinctly marked on the ground so that its boundaries could be readily traced.*

We suppose it will not be questioned that this marking of the boundary of the claim on the ground so that it can be readily traced is absolutely necessary to the validity of the location. (See Rev. Stat. U. S., Sec. 2324.)

The distinct marking of the location on the ground is of the essence of the location; if there is no marking, there is no location. We do not cite authorities upon this proposition, because it is too well understood to require it, and because it is asserted by the plaintiffs in error in their brief.

We submit that the evidence fails to show that this alleged location was ever distinctly or at all marked on the ground. Barieau testified that he posted the notice on June 14th, 1895.

Record, page 64,

and that in the first week of January, 1896, he surveyed and marked the lines of the location.

Record, pages 65, 66.

The notice of location purported to locate this quarter section for A. Barieau and seven other persons *as an association* and as one claim. Now, on January 2nd, 1896, this location of one hundred and sixty acres was not distinctly marked upon the ground at all. Upon the contrary, eight several and distinct locations of twenty acres each were marked upon the ground to be held in severalty by eight persons, but who those persons were nowhere appears, nor was the claim of any particular person to any particular claim in any manner declared or identified. Certainly this does not meet the requirements of the law.

Upon the facts shown, was this a location of one hundred and sixty acres by an association of eight persons or were there eight locations of twenty acres each? If it was a location of one hundred and sixty acres the location was not marked upon the ground. If there were eight different locations, then there was no notice of such locations, no authority to make any such locations for or in behalf of any person, and no discovery even claimed upon more than one of the

subdivisions of the twenty acres, which subdivisions are in no manner identified.

Perhaps we have dealt at too much length with this pretended location of June 15th, 1895, and we will now take leave of it after having directed the attention of the court to the conduct of Mr. Barieau in relation thereto. This witness, who is alleged to have made the location, and upon whose sole and unsupported testimony it is hoped to sustain it, testifies that on the 30th day of December, 1896, being one day before the defendant in error, Miller and his associates made their location, he went upon the ground and made another and different location. He says: "I was on the land in question on the 30th day of December, 1896, between 2 and 3 o'clock in the afternoon. I first went to the east line of the northeast quarter. It rained some, and was blustery and showery and it rained some and the soil was a little sticky so that wherever a man went it left his track. I went to the southeast corner and found the stake and *put up a location notice for a placer mining claim for the northeast quarter of section twenty, township nineteen south, range fifteen east.*"

Record, page 66.

"The notice I posted on the southeast corner was on letter size paper, tacked on a board, and the board put on a stake about two feet above the ground and was posted so that it could be seen fifty or one hundred feet from the corner. *I had the notice recorded in the office of the recorder of the San Joaquin Mining District.*"

Record, page 66.

It is true that the rights of third parties cannot be defeated by any act of Mr. Barieau; but it is also true that this act of Mr. Barieau in attempting to make a location of the lands in

controversy while his alleged location of June 15th, 1895, still covered the same, is a commentary upon Mr. Barieau's testimony given in support of that location. Doubtless the court will have the same confidence in that location of June 15th, 1895, as was manifested by Mr. Barieau himself.

II.

The so-called abandonment executed by Miller on December 31st, 1896, not necessary to open the land to re-location, and the question of its validity is entirely immaterial.

The court finds, that, on or about the 24th day of December, 1896, A. Barieau and his alleged co-locators, made, executed and delivered to the Producers' and Consumers' Oil Company, a deed conveying to that company all the interest, claim and title to the tract of land in controversy which the said persons or any of them had, or claimed to have, and that on or about the 24th day of December, 1896, the said corporation oil company executed and delivered to E. O. Miller, one of the defendants in error, a quit claim deed, conveying and quitclaiming unto the said Miller all the right, title, claim and interest of the said oil company in and to all said lands; and that thereafter, on the 31st day of December, 1896, the said Miller, by his written declaration, abandoned, relinquished and released unto the United States of America, all right in and to said tract of land acquired by him from said Producers' and Consumers' Oil Company and its grantors.

Record, page 26.

These findings were made in response to issues tendered by defendants and intervenor, and the facts found are in support of allegations in the answer of the plaintiffs in error.

Record, pages 18, 19.

These allegations contained in the pleadings of the plaintiffs in error and intervenor were entirely immaterial and of course the findings upon the issues thereby raised are equally immaterial.

The land in controversy was open to exploration on the 31st of December, 1896, not because the so-called Barieau location alleged to have been made in June, 1895, had been abandoned, relinquished and released by any person whatever, but that the land was open to exploration and location on that day because the pretended location of June 15th, 1896, was void from the beginning and had never been in existence. That this pretended location was, in fact, a fictitious and pretended one, and void from the beginning clearly appears from the consideration hereinbefore submitted. It is therefore unnecessary to discuss the legal effect of Miller's so-called abandonment. We will only say, that we concur with counsel for plaintiffs in error in their opinion as to the nature and effect of an abandonment and of the facts necessary to constitute the same; but we disagree entirely upon the question of fact as to whether or not E. O. Miller was a successor in interest of the locators of June 15th, 1895, and of the Producers' and Consumers' Oil Company. The plaintiffs in error seek to draw from the foregoing fact the conclusion that Miller executed said abandonment for the purpose of avoiding the doing of the assessment work upon the claims for the year 1896.

It will be observed that their argument is founded upon the fact, assumed to be true by them, that Miller owned the

location of June, 1895, and the assumption that the only purpose Miller had in making the location of the 31st of December, 1897, was to avoid doing a hundred dollars assessment work. And upon this they would found the further assumption that the Barieau location of 1895 was a valid and subsisting location and that Miller knew it. These inferences are far-fetched, indeed, and, even if correctly made, would be utterly irrelevant and immaterial. The question before this court is, not whether Miller thought the Barieau location was valid or not, but whether it was, in fact, a valid and subsisting location. We think that Mr. Miller's testimony is sufficient to show his motive and to show that they were legal and proper motives. He says:

Record, page 45,

"I knew that the Producers' and Consumers' Oil Company asserted some claim to the balance of the section and that they had pretended by the record to make some kind of a location some time in 1896, but I never knew that a valid location was ever made; certain physical acts are necessary to constitute a valid location. I did not know that any location was made by Barrett and others in 1895, notwithstanding the fact that he made this quit claim deed to me. My reason for making this instrument of abandonment was that I became convinced that the Producers' and Consumers' Oil Company had abandoned the land. The original locators, if ever they did in fact locate it, made a quit claim deed to the Producers' and Consumers' Company. The Producers' and Consumers' Company would make nothing by a quit claim deed to me and delivered me the possession of the land. I was still advised, I believed then, and I still believe that the conveyances operated simply as an abandonment; they surrendered me the possession and made a quit claim

deed. The abandonment was for me from the Producers' and Consumers' Oil Company. The quit claim deed I construed as nothing more than an abandonment and regarded it as such. I abandoned it to the United States whatever there might be. I wanted to make it clear so there would be no question. I wanted to go as far as I could; if they did happen to have any possible right, I wanted to clean it up. I didn't think they had, but my purpose was, if any existed to revest the title in the government of the United States so that I could make—so the land would unquestionably be open to location December 31st, 1896, myself and my co-locators could make a valid mineral location."

And again, the witness said:

Record, page 47.

"When I took the deed from the Producers' and Consumers' Oil Company I considered it operated simply as an abandonment, surrender of possession on the part of the company. I didn't consider they had any title to convey. I didn't consider they got any title from the original locators, as I explained to you a while ago, for the reason that the locators had made quit claim deeds."

From all this it very clearly appears that Miller's motive, in taking these deeds and making this abandonment, was just and laudable. He took the deed from the Producers' and Consumers' Oil Company, not for the purpose of obtaining any right, title or interest in the claim by virtue of the deed, but simply for the purpose of avoiding any contest or claim that might thereafter be made on behalf of the company. He did not know, and did not believe, that the company had any rights in the same or could convey any, but it was a question which he could avoid by taking this quit claim deed. The

quit claim deed was made to himself individually. He had formed an association of persons consisting of himself, Hannah, Hall and five others for the purpose of locating upon that quarter section. Prudence and good faith towards his co-locators required that he should abandon any and all right to any interest in the contemplated location save and except such as he might derive through his location of the land to be made jointly with his associates. Whatever may have been the force of the abandonment between Miller and the Government of the United States, it was certainly effectual to operate between Miller and his associate locators as an estoppel.

The assumption by the plaintiffs in error that this abandonment was made for the purpose of avoiding doing a hundred dollars worth of assessment work on the claim is, in view of all the facts and of the law, somewhat amusing. There was ample time in which to perform this necessary assessment work from the 24th day of December, 1896, at which time Miller received the quit claim deed from the oil company, and, under the law, even if he had failed to complete his assessment work before December 31st, 1896, this fact would not of itself have operated to cause a forfeiture of his claim and to open the same to re-location. The statute upon the subject is as follows:

"And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made; provided, *that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after such failure and before such location.*

Rev. Stat., Sec. 2344.

A resumption of work prior to re-location defeats forfeiture and prevents re-location.

Jupiter M. Co. v. Bodie C. M. Co., 11 Fed. Rep. 666.
Belk v. Meagher, 104 U. S. 279.
Lakin v. Sierra Buttes G. M. Co., 25 Fed. Rep. 337.
Belcher C. G. M. Co. v. Deferrari, 62 Cal. 162.
Farris v. Muldoon, 75 Cal. 284.
Russell v. Brosseay, 65 Cal. 605.

It is the entry by a re-locator, not mere lapse of time that destroys the right of the original owner.

Little Gunnell Mo. Co. v. Kimber, 1st Mor. Rep. 536.

In view of the fact that Miller could have saved the forfeiture of his claim under the Barieau location, if valid, by simple entry upon the land and resuming work before the 1st day of January, 1897, and was not required to complete it before that day, it will hardly be presumed that he was impelled to make the written abandonment of December 29th by a desire to save the claim from forfeiture. Rather will it be believed that he was impelled to make the same because he felt that he had no rights under the location and in justice to his proposed co-locators.

Furthermore, it is to be observed that the Court finds, as a fact, that the abandonment was in *good faith*.

Record, pp. 29, 30.

III.

The location made by E. O. Miller and others on December 31st, 1896, was made in strict compliance with all of the requirements of the law and is now a valid and subsisting location on all of the lands described in the complaint of the defendants in error.

We submit that the observations hereinbefore submitted are sufficient to show that on the 31st day of December, 1896, the land mentioned in the complaint of the defendants in error was unoccupied and unappropriated public land of the United States. We are now to show, that, on that day, E. O. Miller, W. F. Hall, L. E. Hall, R. B. Biddle, J. A. Hannah, D. J. Overall, Harry Levison and Charles H. Smith, an association of persons, entered and occupied that land and made a valid location thereof, under the mineral laws of the United States, in strict compliance to the requirements of those laws.

We are pleased that we are able to concur with counsel for plaintiffs in error that as a matter of strict law, in the absence of a State or local regulation or local customs at the time of making the location, the posting of a notice or the recording of the same is not necessary.

Lindley on Mines and Mining, Sec. 432.
Book v. Justice M. Co., 58 Fed. Rep. 120.
Sutter v. McGuire, 78 Cal. 543.
Thompson v. Spray, 72 Cal. 533.

At that time there was no State law and there is no evidence of any local regulation or custom requiring it. But Miller and his co-locators did both of these things.

Record, page 39.

That these things were done was found by the court, and

is not disputed by plaintiffs in error, and the fact that they were done shows the absolute good faith of the locators of said claim.

We agree with plaintiffs in error that it is absolutely necessary to the validity of every location upon the mineral lands of the United States that it should be marked on the ground, so that its boundaries can be readily traced, and we cannot restrain the expression of our surprise that counsel should think it necessary to cite authorities in support of a rule so fundamental in its character as to be universally understood. In making their location of December 31st, 1896, Miller and his co-locators fully complied with this requirement of the law, for they did mark the boundaries of their location on the ground so that the same could be readily traced. The court so finds.

Record, page 23.

And the evidence is amply sufficient to support the finding. The witness, Miller, testified:

"I inquired either from Captain Barrett or Judge Poston, or some one at the house, where the northwest corner of this quarter section was; they showed me from the house where we were and I went over there and found some rocks; I gathered up the rocks that were there and erected a rock monument. In the center of that rock pile I placed a stake about two feet long, upon which there was a board about a foot long and ten inches wide, and I tacked my location notice on that; that is at the northwest corner of this quarter section, the northwest corner of the northeast quarter. After posting this notice on the northwest corner I went east one-half a mile to the northeast corner of this quarter section. There I found what I thought was about the right place for a corner, and I gathered up some rock that was there in a pile, erected a rock monu-

ment, in which I put a stake about two feet long and about an inch thick; this rock monument was about eighteen inches high and in which I put a stake about two feet long. From that corner I went south half a mile to the southeast corner of this quarter section; there I found what I was satisfied had been a corner previous. I gathered up the rock that were there and piled them and erected another rock monument about eighteen inches high; I did nothing else at this corner. From there I went west a little piece and then I went diagonally across the quarter section and went back over to the cabin at Oil City where I stayed the night before. On the north line of this quarter section, and on the east and on a part of the way on the south line, there was a line of stakes that had been previously put there and I erected no intermediate monument because these stakes that were already there marked the boundaries plainly and clearly; these intermediate stakes were pegs probably five or six inches long and some probably a foot long and about ten or twelve to the half mile. The small stakes were on the line between the corners established by me. I made no survey of the land and had no surveyor with me and they appeared to my eye to be on the line; and since that time I have taken a surveyor there and showed him, to demonstrate whether or not the monuments I then erected were upon the government's sub-divisions and corners. I took the surveyor of Fresno county and showed him the corners I erected and he made a survey and verified it."

Record, pages 40, 41.

W. Hall, one of the locators, testified:

"I am acquainted with that quarter section and was on a portion of it 31st day of December, 1896. * * * While I was there I put up a monument on the southwest corner of this same northeast quarter, a stake; I erected it at the south-

west corner of the northeast quarter which is the center of the section; I put up a rock monument there, probably eighteen inches high. A pile of rock built up of small rock and put a stake up there. My intention in making that monument, my idea was to make a mineral location on that quarter section in connection with E. O. Miller, the plaintiff in this case, and with other parties named as locators on that notice."

Record, page 55.

Geo. L. Hoxie, county surveyor of the county, testified that he was on the quarter section on April 29th, 1899, and then saw the monuments and stakes deposed to by Miller and Hall and that the line of stakes was quite plain.

Record, page 51.

We have quoted only a part of the evidence bearing upon the acts done in marking the boundaries by defendant in error, Miller, and his co-locators on December 31st, 1896. Indeed, we do not understand that plaintiffs in error deny that the monuments and stakes and location notice were placed upon the land as testified by Miller and Hall and that the intervening stakes were on the boundary lines of the quarter section. We understand their contention to be that as a matter of law these were not sufficient. We think they were sufficient and more than sufficient. Let it be remembered that this is a placer claim, located according to the legal sub-divisions of the United States survey, and that the notice of location posted at the northwest corner of the quarter section purported by its terms to locate the entire quarter section and that these corner stakes and monuments were at the corners of the quarter section and the smaller stakes between those corners.

Whether or not a location is so marked on the ground

that its boundaries can be readily ascertained is a question of fact for the determination of the jury.

Taylor v. Middleton, 62 Cal. 656.
Anderson v. Black, 70 Cal. 226.
Eilers v. Botman, 111 U. S. 356.
DuPrat v. James, 65 Cal. 555.
Lindley on Mines and Mining, Sec. 373.

In this case the court has found that the location was distinctly marked upon the ground so that its boundaries could be readily traced. It is now too late for the plaintiffs in error to attack that finding. We content ourselves by citing a few of the very great number of authorities which show the sufficiency of the location.

Duprat v. James, 65 Cal. 555, *supra.*
Howeth v. Sullinger, 113 Cal. 347.
Jupiter Mining Co. v. Bodie Con. M. Co., 11 Fed. Rep. 667-677.
Lindley on Mines and Mining, Sec. 373.

We further assert that all of the persons named as locators in the location made December 31st, 1896, were bona-fide locators and said location was made for the benefit of all of them.

Plaintiffs in error see fit to attack the location under which defendants in error claim, upon the ground that it was in fact made by Miller, Hall and Hannah, and claim that they were the only bona fide locators out of the eight persons named in the location, and that the other five were mere dummies.

As a matter of law, we deny the right of these plaintiffs in error to attack this location or any location upon that ground. The location segregated the land from the public domain of the United States and while it existed prevented any other

locations upon the land. Whether or not that location was fraudulent, is a question that can be raised only by the Government of the United States, and is a question with which plaintiffs in error have nothing to do. The cases cited by plaintiffs in error, so far from sustaining their position, show that we are correct in this statement of the law, but the contention of plaintiffs in error is so exceedingly far fetched, and is so utterly without foundation in the evidence, that, waiving all questions of law, we prefer to meet them upon the fact.

The court finds that this location was made by all of the persons named in the notice of location as an association of persons and for the benefit of such association,

Record page 30,

and the court further finds that all of plaintiffs' in error allegations of fraud and collusion and conspiracy are untrue.

And the evidence is ample to sustain the findings.

Record, pages 30, 31, 32.

The record further shows that Harry Levison, D. G. Overall and Charles Smith, three of those alleged dummy locators, were in attendance upon the court and were sworn as witnesses at the trial, and yet the plaintiffs in error made no effort by their testimony to establish the utterly unreasonable allegations of their complaint. Without further discussion we submit that the evidence shows that these locators formed an association for the purpose of making this location and that the location was made with the knowledge and consent of each and all of them and for their joint benefit.

Mitchell v. Cline, 84 Cal. 409, cited by plaintiffs in error, is entirely beside the question. This was a case where the names of certain persons were used as locators in their ab-

sence, without their knowledge or consent and avowedly not for their benefit but for the benefit of others, and in pursuance of an agreement made between the persons actually making the location, that the names of these dummy locators should be used, not for their own benefit but for the benefit of the persons using them.

Durrant v. Corbin, 94 Fed. Rep. 382, also cited by plaintiffs in error, was a case where the court found as facts upon the testimony of the party claiming under the location, that the locators were either employes or friends of the party claiming under the location and that they had nothing whatever to do with the making of such location and that the defendant simply used their names as locators in the expectation that they would afterwards convey whatever colorable rights that might be acquired in their name to him without consideration.

Cases, such as above, can give little assistance in deciding a case such as this, where the court finds and the evidence shows all the facts to be directly opposed to any of the facts upon which said cases were decided.

We also assert that the location of December 31st, 1896, under which defendants in error claim, is based upon a discovery made before the rights of any other persons attached to the property.

The court finds that the defendants in error have dug, bored and excavated for petroleum and other fluid products and have expended in such work the sum of more than thirty thousand dollars, and by means thereof have discovered large quantities of petroleum on said property, and that there now exists and did exist at the commencement of this action wells of great depth upon said property, sunk and excavated by the Home Oil Company in which there is a daily flow of large quantities of petroleum of great value.

The evidence shows that the first well was completed and petroleum found therein in July, 1897, as the result of the large expenditure of money and of several months of labor by The Home Oil Company. We understand that plaintiffs in error do not question the fact that this work was performed, money expended and petroleum discovered. We also understand that they do not controvert the legal proposition that if this discovery was made before the rights of others attached to the property, that it is a discovery sufficient to meet all of the requirements of the law and support the location of December 31st, 1896, under which plaintiffs claim.

The locations of the plaintiffs in error are invalid.

We submit that the foregoing observations are sufficient to show that on the 31st day of December, 1896, the land in controversy was public mineral land of the United States, unappropriated and open to exploration and occupation; that on that day E. O. Miller and his seven co-locators made a location of all of said lands under the mining laws of the United States by posting a proper and sufficient notice of location and thereafter recording the same and by distinctly marking the location on the ground so that its boundaries could be readily traced; and that thereafter, and by July, 1897, very large and valuable discoveries of mineral were made upon various parts of said mining claim by the defendants in error after the expenditure of many thousands of dollars.

After the labor, enterprise and expenditure of defendants in error have demonstated the great value of the property, plaintiffs in error now seek to defeat their rights and to deprive them of their just reward upon the ground that after the posting of the notice and the marking of the boundaries on the 31st day of December, 1896, and before the discovery

of petroleum in July, 1897, they, the plaintiffs in error had also marked the boundaries and had made a discovery of petroleum upon the lands claimed by them.

A question of fact was here squarely presented for the determination of the court below, and that court has as squarely found and declared that the plaintiffs in error never at any time made any discovery of any mineral oil upon any part of said land.

Record, page 25.

A reading of the testimony will show that this finding of the court is amply sustained by the testimony and that this alleged discovery made by the plaintiffs in error was a pretended, false and fictitious discovery. We say that it was false, pretended and fictitious, because if the facts alleged in support thereof are taken to be true, those facts under the law are entirely insufficient to support the requirements that a discovery must be made and because we are of the opinion that a reading of the transcript will show that the facts alleged by plaintiffs in error in support of their claim of discovery have not been established to the satisfaction of the judicial mind.

In a former part of this brief, and in discussing Barieau's alleged discovery, claimed in support of his location of June, 1895, we had occasion to discuss the law bearing upon the matter of discovery and to cite many authorities upon the question. The discovery claimed by the plaintiffs in error is in many respects similar to the discovery claimed by Barieau and is equally vague and visionary.

We respectfully refer the court to that portion of our brief for a discussion of the matters of law connected with this pretended discovery of the defendants; we shall here meet the plaintiffs in error directly upon the questions of fact.

The plaintiffs in error do not say in their answer that they discovered petroleum. The allegation is that they discovered a "seepage of petroleum."

Record, page 11.

At the trial, A. Y. Chrisman, one of the plaintiffs in error, testified as follows:

"Before placing the notice there—mining location—I made an examination as to the presence of any petroleum or oil on these two claims nearing the east line of the northeast quarter; there is a little gulch there and there is a little oil seeps out with the water and comes out at the gulch there; in relation to my boy's claims, that would be just inside the southeast corner of his claim, would be on his claim. I made a discovery on my claim near the north line inside of my claim in January, 1897, after I had posted the notice; before I posted my notice I noticed strong evidences of oil there on my claim, black shale cropping out in places."

Record, page 82.

H. T. Chrisman, the other defendant, testified as follows:

"I discovered oil there before this time; I was there prospecting; there was a stream of water there oozing out in different places; the first time I became acquainted with it was in December, 1896; I saw the spring about twice between the 1st of December and the 1st of January; I saw it that time on December 31st; along the gulch there in several places water coming out in two places, this oil was on it. I was somewhat acquainted with the oil they were getting over there and around there in different places in the mountains; it had considerable resemblance and in fact was that and I called it oil; I did not see much, the pools it was on covered."

Record, page 78.

And this was the only discovery made by these defendants and this is the only evidence in its support.

No one ever saw or heard of this alleged discovery of the plaintiffs in error, except the plaintiffs in error themselves, and it does not appear that they ever saw the oil discovered except upon the one occasion when it was discovered by them. Upon the other hand, C. A. Canfield, W. F. Chandler, I. F. Poston, and E. L. Doheny were sworn as witnesses, and it appeared that they were all perfectly familiar with the land in controversy and with the particular point where the witness, H. T. Chrisman, stated that he had made his discovery. And they all testified that they had examined the same for the express purpose of ascertaining any evidences of oil and they testified "that there was none at all, absolutely none."

Record, pages 96-99.

Upon the law and the facts we imagine that it will be an exceedingly difficult undertaking for the plaintiffs in error to successfully attack the finding of the court that they never at any time made any discovery upon the disputed territory.

Reference is made in the brief on behalf of the plaintiffs in error, and also, in the decision of the Supreme Court, to the case of Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. 673, where, as was said by our Supreme Court: "The Circuit Court was dealing with this precise question in regard to this precise land under these identical circumstances."

That was a suit brought against these defendants in error in the Circuit Court of the United States in and for the Ninth Judicial District, Southern Division, where the complainant sought to wrest the entire quarter section from these defendants in error, asserting that the Miller location was invalid, and that the location under which it claimed was prior in right. We recommend it to the careful consideration

of this court as it deals with the exact land in controversy, and the matter was given exhaustive consideration by Ross, Circuit Judge. In the course of his decision, he says:

"The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, but there is no showing in the proof that he discovered any seepages of oil in it. On the contrary, I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land. There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Rev. Stat., Secs. 2320, 2329; Mining Co. v. Doe (C.C.), 56 Fed. 685. Indications of the existence of a thing is not the thing itself. * * *

"What has been said in respect to the absence of any discovery of mineral by Wilson on January 1, 1896, equally applies to his pretended location of January 1, 1893, and to Barrett's pretended location of the same ground in 1895, under whom the defendants claim. Barrett, during the year 1895, undertook to transfer his right to the ground in question, which had no existence in fact or law, to the Producers' &

Consumers' Oil Company, which company later undertook to transfer the same thing (which was nothing) to the defendant, Miller, and on December 31, 1896, Miller undertook to relinquish to the United States what he did not have, namely, a right to the land in question, and immediately thereafter, to wit, on the 31st day of December, 1896, without having made any discovery of mineral upon the land, undertook to locate the quarter section in question under the mining laws, for himself and seven other persons, by posting the required notice and marking the boundaries. Shortly thereafter he undertook to confer upon Barrett the right to enter upon and explore for and develop oil upon the claim, and to dispose of the oil there found. Barrett thereupon went into actual possession of the land and early in 1897 erected a derrick thereon, and commenced boring for oil, and shortly thereafter transferred, with the consent of Miller, whatever rights he acquired from him to the defendant, Home Oil Company, which company proceeded with the boring, and in October and November, 1897, at a depth of about 800 feet, actually discovered oil in the ground, since which time it has remained in the actual possession of the claim, and bored several other wells, several of which proved to be flowing wells, and in the aggregate yield a large quantity of oil. It would thus seem that the location made by Miller and his associates on the 31st day of December, 1896, was properly marked upon the ground, and the notice of location properly posted, followed, as it was, by the actual possession of the ground by those claiming under it, and by the actual discovery of mineral within the limits of the claim by them, the requirements of the United States statute in respect to the location of mineral land were answered, no rights of any third party having in the meantime intervened."

It is true that, in discussing the question of the discovery, the Supreme Court of the State of California, in its decision, and solely for the purpose of the argument, and for the purpose of making the position of these plaintiffs in error as strong as possible, assumed the existence of the seepage testified to by them, although the fact is, and the record so shows, that these plaintiffs in error never discovered even a seepage of petroleum or other mineral oil within the boundaries of their respective claims.

Record, page 25.

A large portion of the brief presented on behalf of the plaintiffs in error is devoted to the consideration of the question as to whether a seepage is a discovery of mineral and their contention is based upon the assumption, as are many other of the arguments of counsel, that it appears from the record, and is a fact, that the plaintiffs in error discovered, within the boundaries of their respective claims, a seepage of oil. As we have shown, many witnesses testified that no seepage of oil ever existed at any place within the boundaries of the quarter section, and the court found, *as a fact,* that no discovery was ever made by plaintiffs in error, so that a discussion as to what constitutes a discovery is inappropriate and presents but a moot and academic question, in view of the finding of the lower court, that not even a *seepage* of oil was ever discovered.

Thus far we have discussed the questions presented upon the theory that the findings of the court show that the mineral location under which these defendants in error claim was a valid location, and the attempted locations of the plaintiffs in error were invalid. One other view presents itself, which, in our opinion, is determinative of the merits of this controversy, and that is that the possessory title of the defendants in

error, whether or not based upon a valid location, was sufficient to support the judgment of the courts as against any asserted claims of these plaintiffs in error.

The facts upon which this case is to be decided are: that E. O. Miller was the owner of the property,

Record, page 39.

That the Home Oil Company was the lessee of the property, claiming title under the defendant in error, E. O. Miller, and *"at the commencement of this action, ever since has been, and now is in the actual possession of the same and every part thereof."*

Record page 22.

That the Home Oil Company on the 17th day of September, 1897, obtained a lease of the property in controversy, and on that went into the possession of all the same under and by virtue of said lease and *"ever since have been, and now is in the exclusive possession of all of the same and every part thereof."*

Record, page 23.

That the alleged locations of plaintiffs in error were made shortly after midnight on the 1st day of January, 1897.

Record, pages 78, 80.

That, at that time, no part of said quarter section was vacant, but that the whole of the same was then in the actual possession of E. O. Miller and his co-locators, and that the plaintiffs in error did not make their location in good faith, and that they never did or performed any work or labor thereon as required by the laws of the United States, or the State of California, and that neither of the plaintiffs in error

ever discovered any seepage of petroleum or mineral oil on their respective claims.

Record, page 25.

Such being the facts our contention upon that branch of the case is that these plaintiffs in error were trespassers, and no right was initiated in their behalf by their intrusion at midnight upon the possession of these prior locators, under whom the defendants in error claim, and being trespassers, the actual possession of the defendants in error was sufficient in law to entitle them to a judgment.

In the case of Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732, it was stated:

"Unless some reason is shown not found in this record these were the persons entitled to make preemption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their homes, seize their improvements and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make their improvements on unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less turpitude." * * * "It follows that the de-

fendants could not have made any lawful entry on the lands where the hay was cut in this case; that no law existed which gave them any right to make such an entry; that they were *mere naked trespassers* making an unwarranted intrusion upon the enclosure of another; an enclosure and occupation of years, on which time, and labor and money had been expended; and that in such a wrongful attempt to seize the fruits of other men's labor there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous and the judgment founded on it must be reversed."

In the case of Nevada Sierra Oil Co. v. Home Oil Co., 98 Fed. Rep. 673, *supra*, Judge Ross said:

"It is true that upon mineral land of the United States, upon which there is no valid existing location, any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and above board and made in good faith. Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 372. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent

from his cabin. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws."

In the case of Cowell v. Lammers, 21 Fed. 200, it appeared that one McCarty, the manager of the plaintiff, was in the actual possession and occupation of certain land having it under fence and in actual use; that the defendant, by permission of the plaintiff, had erected a cabin on a portion of the lands of the plaintiff other than that part upon which the trespass is alleged to have been committed. That thereafter, the defendant, without the consent and against the will of plaintiff, entered upon the portion involved in the action, assuming it to be public mineral land, and located a mining claim thereon. It will be seen that there was no force or fraud of any kind exercised, but that the mining location was made against the will and without the consent of the plaintiff.

In discussing the question the Court says:

"The complainant insists that, in view of the indisputable facts appearing in the case, the defendant is not in a position which entitles him, in this proceeding to collaterally assail the validity of his title under the patent for two reasons; and, if I rightly comprehend the decisions of the Supreme Court upon similar questions, he is clearly right in this position. In Atherton v. Fowler the Supreme Court distinctly held that no right of pre-emption can be established by a settlement and improvement on a tract of land conceded to the public, where the pre-emption claimant intruded upon the actual possession of another, who, having no other valid title than

possession, had already settled upon, inclosed, and improved the tract, that such an intrusion is but a naked, unlawful trespass, and cannot initiate a right of pre-emption. (96 U. S. 513.) This decision was affirmed in Hosmer v. Wallace, 97 U. S. 759, and Quinby v. Conlan, 104 U. S. 421. In the latter case the court says: 'A settlement cannot be made upon land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emption right. Such is the purport of our decisions in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 97 U. S. 575; 104 U. S. 423. The laws no more authorize a trespass upon the actual possession and occupation of another, for the purpose of initiating a pre-emption right to take up and acquire under the statutes the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land. The law does not encourage or permit, for any purpose, unlawful intrusions and trespasses upon the actual possession and occupation of another. To permit a right or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such a character as to greatly disturb the public tranquility. We are, fortunately, not without painful examples of this kind in this state. Actual possession and occupation of lands in good faith, public or otherwise, have always, as against naked trespassers, been regarded as evidence of title, and fully protected by the courts of this state from its first settlement. In this case the defendant intruded upon the actual possession and occupation of the complainant, prospected for and located a supposed mine upon lands which had been inclosed with a substantial fence and in the actual possession, occupation, and use of the complainant and his immediate grantor for eight years, claiming title under a patent of the United States, reg-

ularly issued fourteen years before. He is a mere stranger and trespasser upon the actual possession and occupation of the complainant, without any right recognized by the law of the land, and is not in a position to assail the complainant's title. If this is not the rule established by the decisions of the Supreme Court, then I am unable to comprehend their import. See also Doll v. Meador, 16 Cal. 320, et seq."

In the case of Crossman v. Pendery, 8 Fed. 693, it appeared that the case was submitted upon an agreed state of facts to the effect that the ground in controversy was covered by two locations, both regular in form. That the Orion claim was first surveyed, located and staked, and that the locators had steadily prosecuted work in the development thereof, and had discovered mineral in several places. That the other location was made subsequent to the Orion and while the locators of the latter were in possession thereof, and that under the second location mineral was discovered and before the discovery of the locator of the Orion.

Justice Miller, after stating the facts, proceeds:

"The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy? It is the opinion of the Court that inasmuch as the plaintiffs allowed defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and made location thereof, without protest, the defendants now have a better right. But the plaintiffs might have protected their actual possession of

their entire claim by proper legal proceedings prior to the discovery by the defendants, or by either party. A prospector on the public mineral domain may protect himself in the possession of his pedis possession while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the Government of the United States. But if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such discoverer a title to the mineral first discovered, against which a mere possession of surface cannot prevail, and in this case judgment must be for the defendants."

In the very late case of Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, Justice Brewer said:

"It must be remembered that mere occupation of the public lands gives no right as against the government. It is a matter of common knowledge that many go over the public domain, build cabins and establish themselves temporarily, at least as occupants. * * * Such occupation is often accompanied by buildings and enclosures for housing and care of stock. * * * These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their possession or compel them to leave. Their possessory rights are recognized as of value and may be subjects of barter and sale. * * * In this respect we must notice the oft-repeated declaration of this Court, that 'the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereof.' Ard. v. Brandon, 156 U. S. 537, 543, 39 L. ed. 523, 526, 15 Sup. Ct. Rep. 406; Northern P. R. Co. v. Amacker, 175 U. S. 564, 567, *ante* 274, 275, 20 Sup. Ct. Rep. 236."

In the case of Pacific L. & I. Co. v. Elwood Oil Co. 112 Fed. 4, Judge Hawley, of the United States Circuit Court of Appeals, said:

"The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton v. Fowler, 96 U. S. 513, 513, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only to be exercised on unsettled lands; that the right to make improvements is to be exercised on unimproved lands; that the right to erect a dwellinghouse is to be exercised only on vacant land, and that none of these things can be done on land when it is occupied and used by others.

"No right can be initiated on government land which is in the actual possession of another by forcible, fraudulent or clandestine entry thereon. Cowell v. Lammers, 21 Fed. 200, 202; Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579; Tremouth v. San Francisco, 100 U. S. 251; Mower v. Fletcher, 166 U. S. 380, 385-6; Haws v. Victoria Copper M. Co. 160 U. S. 303, 317; Nickals v. Winn, 17 Nev. 188, 193; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588; Rourke v. McNally, 98 Cal. 291.

"The decisions upon this point are not all confined to cases where the entry is forcible, although in such cases the courts did not discuss the question whether the same principles would apply to cases of an entry upon lands in the actual possession of another, without the use of force.

"In Quinby v. Conlan, 104 U. S. 420, 423, the element of force is not shown to have existed and it is not adverted to in the opinion. The Court said: 'A settlement cannot be made upon public land already occupied; as against exist-

ing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decision in Atherton v. Fowler, 96 U. S. 513, and Hosmer v. Wallace, 79 id. 575.'

"In Goodwin v. McCabe, *supra*, the Court said: 'If the plaintiff was in the actual possession of the land, we think the defendant's proceedings were invalid, although his entry was accomplished without the use of force. This seems to be the result of the authorities. * * * The reasoning of the court in all cases seems to us to forbid the invasion of the actual possession of another, whether such invasion is accomplished by the use of force or not.'

"In Gird v. California Oil Co., 60 Fed. 531, 545, this principle is recognized. The Court said: 'If Irland was in the actual possession, and working the ground for himself, and Barfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because in that event, the location would have been made upon ground not vacant, and open to location, but upon ground in the actual and adverse occupancy of another.'

"Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not, at the time of such selection, 'vacant land open to settlement,' it is unnecessary to review the many other questions which were elaborately argued by the learned counsel.

"It necessarily follows, from the views we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief against the defendants. The Court did not, therefore, err in sustaining the demurrer and dimissing the bill."

The same rule has been established by various decisions of our state Court. In the case of Davis v. Scott, 56 Cal. 165, the syllabus is as follows:

"The right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others. The Justice, Morrison, in referring to the case of Atherton v. Fowler, *supra*, quotes the decision of Justice Miller with approval, saying, among other things, 'The defendant, having made an ineffectual attempt to pre-empt the land in controversy, invaded the plaintiff's possession, and now withholds the possession from him. It is impossible for us to perceive any just claim or right which the defendant can assert in support of his entry. He did not have a pre-emption claim to the land, or to any portion thereof, and could not, under the highest authority of law, become a pre-emptioner thereof. The land was in the actual possession and occupation of the plaintiff at the time the defendant attempted to locate a pre-emption claim thereon, and it was not, therefore, subject to pre-emption.'"

A later case is that of McBrown v. Morris, 59 Cal. 64. The opinion was written by Thornton, and concurred in by McKinstry and Ross, and reaffirms the case of Atherton against Fowler, and other decisions of this state and of the United States. It appeared in that case that at the time of the entry complained of, the plaintiff was in actual possession of the land, and used the same for dairy and other purposes, and that the main question presented was whether the defendant could initiate a right by entering and settling upon the land within the inclosure of and occupancy and possession of another without his consent and against his express prohibition.

In part, Judge Thornton says:

"The right to make a settlement was to be exercised on unsettled land, and to make improvements on unimproved land. * * * It would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire any inchoate rights to the public land by trespass. That the entry of defendant as expressly found was made without the consent of plaintiff, or his tenants, and against their wish, and he was forbidden to make such entry by them. The findings of fact bring this case within the determination of the cases cited. * * * That such an intrusion, though made under pretense of pre-empting the lands is but an unlawful trespass and cannot initiate a right of pre-emption."

In the case of Rourke v. McNally, 98 Cal. 291, the court says:

"Since she entered into the actual possession of another, it is no moment that her entry was peaceable, because made in the presence of plaintiff. * * * Until she has acquired some such right or connected herself in some lawful mode with the true title, she cannot resist the presumption of title in the plaintiff which arises from the fact of his prior possession. The laws of the United States do not authorize an entry upon the actual possession of another for the purpose of making a settlement, though made by one qualified to purchase from the government to acquire such a homestead, although such entry is made with the intent to acquire the title in some lawful mode. (Atherton v. Fowler, 96 U. S. 513; Dunwood v. Martin, 120 U. S. 369; Quinby v. Conol, 104 U. S. 381; McBrown v. Morris, 59 Cal. 68; Goodwin v. McCabe, 75 Cal. 584; Bullock v. Rouse, 81 Cal. 590; Peterson v. Kinkead, 92 Cal. 372.)"

In the case of McGuire v. Brown, 106 Cal. 660, it is said:

"Our conclusion is supported by analogy also with the rule for many years enforced both in the federal courts and the courts of this state, that the right of property which the laws of Congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. (McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 588, and cases cited.)"

In the case of Phoenix M. & M. Co. v. Lawrence, 55 Cal. 143, it is said:

"The only issuable question was really the intention with which the defendants entered. They claimed in their answer that they entered in good faith, believing that the ground was vacant, and subject to location according to the mining laws. But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right." * * *

"But the defendants offer no evidence of right or title. They knew that the mine was in the possession of the plaintiff and that half a million of dollars had been expended on it; and they admit that they entered upon it, not upon the faith of any title or right in themselves, but to take advantage of what

they supposed to be a defect in the title of plaintiff. * * * It is apparent that the defendants, by their own testimony, did not enter upon the mine under any title or claim of right which they had to the mine. They entered only because they believed or suspected, that the plaintiff's claim of title was defective. After their entry without right or color of title, they went through the forms of making a location, and posted a notice thereon, which they caused to be filed in the Recorder's office of the district."

In the early case of Attwood v. Fricot, 17 Cal. 43, the Court says:

"We are inclined to think that some of the instructions given at the instance of the defendant, whether correct or not, as abstract propositions applicable to real estate, had a tendency to mislead the jury when applied to the facts of the record. Mining claims are held by possession, but that possession is regulated and defined by usage and local, conventional rules, and the 'actual possession' which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be acquired in a mining claim in order to give a right of action for the invasion of it. The claim must be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of the mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters bona fide under color of a title, as under a deed or lease, the possession of a part against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of

the possessor, in such instances, would not be worse than that of the occupant of other real estate, in which case the rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger, with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc.; but the case we suppose is of a possession taken independently of such rules."

Again, in the great case of English v. Johnson, 17 Cal. p. 108, which is more largely cited, perhaps, than any other case in the books, upon this subject, the Court takes occasion to say:

"The Court charged the jury, in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain an action; and further, that this possession need not be further evidenced by actual inclosures, but 'if the ground was included within distinct, visible, and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries,' this was enough as against any one entering without title. We see no objection to this ruling. In the late cases of Atwood v. Fricot, et al., *ante* 37, we lay down some rules on this general subject. The taking up of mineral land in pursuance of the mining regulations of the vicinage gives possessory title to the claims, just as an entry in the land office, or the following of prescribed rules given by statute, gives a possessory title to public or agricultural land. But it does not follow, because this is the regular or usual way of obtaining possession, that a possession not so obtained would necessarily

be without the protection of the law. Possession not taken in pursuance of these rules would still be good as against one not taking possession in accordance with the rules of the vicinage, but merely coming upon the premises in the same manner as the prior possessor. The actual prior possession of the first occupant would be better than the subsequent possession of the last.

"The question arises as to the extent of the possession of the first taker, and the rules which determine this question. In mining claims we require no other acts, as evidence of possession, than those usually exercised by the owners of such claims. A miner is not expected to reside upon his claim, nor to build upon it, nor to cultivate the ground, nor to inclose it. The claim is usually of a small strip of land compared with the extent of ground generally taken up for agricultural purposes. Its only value is in working it and extracting minerals. A party may be in possession by himself, or by his agents or servants. Going on the land to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting, or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off to run into the claim—would be a possession of the claim within the meaning of the rule. If, as was held in the case of Attwood v. Fricot, et al., the party entered under written claim or color of title, his possession except as against the true owner or a prior occupant, would be good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. In this case, it seems the plaintiffs took up, in connection with others, these claims sued for, marking and defining, in the way usual among miners, the limits; and also bought out the interest of two of their associates, original appropriators. But we think where a claim is distinctly defined

by physical marks, that possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only upon, or of a part, and though the party does not enter in accordance with mining rules, or under paper title. The rule which applies to agricultural land, and holds to a more strict interpretation of a *possessio pedis,* does not apply to such a case. Inclosure, if not impossible, besides being probably hurtful to other interests and rights, would be wholly useless. It would give no greater or better advertisement of the extent of the claim than those physical signs, nor give any better protection to the premises against intrusion, or show any higher power of dominion."

Again, in the case of Table Mt. Tunnel Co. v. Stranahan, 20 Cal. 198. (We quote from the syllabus):

"Possession of mining ground, acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule."

Applying these principles of law to the facts in this case, as determined by the courts of the State of California, we are of the opinion that our contention upon this branch of the case should be sustained, and that this court should determine, as a matter of law, that the decision of the supreme court of the state of California is based upon grounds, non-federal in character, sufficient to support its judgment.

In the very late case of Clipper Min. Co. v. Eli Min. & L.

Co., 194 U. S. 220, this identical question was presented and considered. In the course of the decision, this court said:

"It will be seen that Section 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession excludes any trespass. No one, without his consent, or, at least, his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. It was the judgment of Congress that, in order to secure the fullest working of the mine, and the complete development of the mineral property, the owner thereof should have the undisturbed possession of not less than a specified amount of surface. That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In Belk v. Meagher, 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Wait that 'a mining claim perfected under the law is property in the highest sense of that term;' and in a later case (Gwillim v. Donnellan, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112) he adds:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles the owner to the exclusive possession of the land, the first location operates as bar to the second." * * * *

"The difficulty with the case presented by plaintiff in error is, that under the findings of fact, we must take it that the entries of the locators of these several lode claims upon the placer grounds were trespassers, and as a general rule no

one can initiate a right by means of a trespass. Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Haws v. *Victoria Copper Min. Co. 160 U. S. 303, 40 L. ed. 436, 16 Sup. Ct. Rep. 282. See also Cosmos Exploration Co. v. Gray Eagle Co. 61 L. R. A. 230, 50 C. C. A. 79, 112 Fed. 4, in which the court said (L. R. A. p. 242, C. C. A. p. 93, Fed. p. 17);

"No right can be initiated on Government land which is in the actual possession of another by forcible, fraudulent, or clandestine entry thereon. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. 200, 202; Nevada Sierra Oil Co. v. Home Oil Co. 98 Fed. 674, 680; Hosmer v. Wallace, 97 U. S. 575, 579, 24 L. ed. 1130, 1132; Trenouth v. San Francisco, 100 U. S. 251, 25 L. ed. 626; Mower v. Fletcher, 116 U. S. 380, 385, 386, 29 L. ed. 593, 595, 6 Sup. Ct. Rep. 409; Haws v. Victoria Copper Min. Co. 160 U. S. 303, 317, 40 L. ed. 436, 440, 16 Sup. Ct. Rep. 282; Nickals v. Winn, 17 Nev. 188, 193, 30 Pac. 435; McBrown v. Morris, 59 Cal. 64, 72; Goodwin v. McCabe, 75 Cal. 584, 588, 17 Pac. 705; Rourke v. McNally, 98 Cal. 291, 35 Pac. 62."

If a placer locator is, as we have shown, entitled to the exclusive possession of the surface, an entry thereon against his will, for the purpose of prospecting by sinking shafts or otherwise, is undoubtedly a trespass, and such trespass cannot be relied upon to sustain a claim of a right to the property in dispute.

Upon the merits, therefore, we confidently assert that the position of the trial court, and the Supreme Court of the State of California, is right, and that the location under which these defendants in error should be upheld and adjudged valid as against any asserted claim of these plaintiffs in error.

V.

The plaintiffs in error are not in position to present for the consideration of the court their contention that the conveyance to E. O. Miller by his associates on July 31, 1897, being given prior to any discovery, vested no title in him, or his lessees, which contention is presented under paragraph VI, page 63 of their brief.

The position of the defendants in error upon this branch of the case is as follows:

1. The plaintiffs in error are to be treated as intruders and trespassers and cannot raise this question.

2. That the decision of the Supreme Court of the State of California is correct under the facts in this case.

It would seem apparent that it does not lie in the mouth of these plaintiffs in error to question the validity of the placer mining location under which the defendants in error claim for the reason that they have in no manner connected themselves with the United States, and upon the present hearing are to be treated as mere trespassers and intruders upon the prior possession of the defendants in error.

The facts upon which this case is to be determined by this court are: that the plaintiffs in error never made any discovery of petroleum or other mineral within the boundaries of their respective claims; that they have never done any assessment work whatever to keep alive their claims; that for the purpose of making their attempted locations, about midnight, or in the morning of January 1st, 1897, they intruded upon the possession of E. O. Miller, one of the defendants in error; that they never have been in possession of the land, but that all of the land in controversy ever since

December 31, 1896, has been in the sole, exclusive and personal possession of the defendants in error. These facts mean, if they mean anything at all, that these plaintiffs in error cannot bring in question the validity of the title under which these defendants in error claim, as the actual possessory title of the defendants in error is sufficient to support the judgment of the courts of the state of California as against the plaintiffs in error. In that behalf, we refer you to the argument already presented and the authorities to which we there referred, in support of the possessory title of these defendants in error.

In the case of Horn v. Jones, 28 Cal., 194 it was said:

"It was held in Head v. Fordyce, 17 Cal. 151, that a party 'has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property.'"

In the case of McGovern v. Mowry, 91 Cal., 383, it was stated:

"His contention is, that it is incumbent upon the plaintiff in a suit of this character to establish a perfect title of record or by prescription, whether the defendant has any title or not, and that on the failure of such proof by the plaintiff, the action should be dismissed. Counsel for respondents claim, on the contrary, that actual possession under claim of ownership is sufficient evidence of title in the plaintiff as against a trespasser or one who establishes no title in himself.

"Section 1006 of the Civil Code provides that 'occupation for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession.'

" 'The possession of real estate is prima facie evidence of the highest estate in the property, to wit, a seizin in fee.' " (Hill v. Draper, 10 Barb., 458.)

"The plaintiff was in the actual possession and occupation of the premises at and for a long time before the commencement of this action. This was sufficient to enable him to maintain an action to quiet title against any one who, like defendant, never had any title, but who claimed to have title to the premises."

In the very early case of Hicks v. Davis, 4 Cal., 68, this rule is announced in the following language:

"We have always determined that possession is prima facie evidence of title, and this principle is firmly fixed in all common law jurisprudence. That its efficacy has been impaired by modifications and conditions, by some judges in other countries, is clearly manifested by the decisions."

In the case of Winans v. Christy, 4 Cal., 70, it was held:

"We decided in the case of Hutchinson v. Perley, ante, 3, that possession was prima facie evidence of title and that proof of prior possession was sufficient evidence on which to maintain ejectment against a mere naked trespasser. * * * It is not a mere prior possession, but possession coupled with color of title, which must prevail, except where a better title is shown in the defendants. * * * Neither were the plaintiffs, although they had alleged in their declaration a fee simple title, compelled to prove the same. They could properly rely upon prior possession, if they chose to do so."

In Potter v. Knowles, 5 Cal. 87, the following language is used:

"In Adams on Ejectment, the rule in such cases is laid

down thus: 'It has already been observed that possession is prima facie evidence of ownership; and as between two parties who rely upon possession solely, the presumption is in favor of the first possessor; so that proof of possession by a claimant, however short, will entitle him to recover, unless the defendant can account for such possession or show a prior possession or title in himself, or a third person.'"

In Crandall v. Woods, 8 Cal., 136, the following language is used:

"One who locates upon public lands, with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect him as against trespassers. If he admits, however, that he is not the owner of the soil, and that the fact is established that he acquired his rights subsequent to those of others, then as both rest alike for the foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule,—*qui prior est in tempore, potior est in jure*, must apply."

In the case of Hicks v. Coleman, 25 Cal., at page 141, it is said:

"In the apt and accurate language of Mr. Justice Heydenfeldt, in Norris v. Russell, 5 Cal. 250, 'it is objected that the defendant had color of title, although his possession was subsequent to plaintiff, and therefore it is urged his possession ought to prevail. But it must be held in view that prior

possession is evidence of title, and cannot by any system of reasoning be made to yield to mere color of title, or in other words, to that which is not title."

Also in Keane v. Cannovan, 21 Cal. 305, Mr. Chief Justice Field used language equally applicable. He said:

"The possession of Monodolet was evidence of seizin in fee in him, and no further or higher evidence of title was required to enable the plaintiff claiming through him to recover, until the defendant had shown an anterior possession or had traced title to a paramount source. It is immaterial, in this view, whether we consider the tax deed to Dumartheray sufficient to constitute color of title or otherwise."

In the case of Page v. Fowler, 37 Cal., 100, it was held:

"A party in the actual possession of public land, to which he has no title, is to be deemed the owner as against mere intruders without title or color of title; and the fact that such party has a deed for the land from one who did not own it, does not place him in a worse position, nor does it enable a trespasser to claim that he must rely on his paper title, and not on his prior possession."

In the case of Fletcher v. Mower, 56 Cal., 421, it is said:

"But it is quite obvious that the plaintiffs, by virtue of their prior possession, as found by the Court, were entitled to recover the possession of the premises from a mere naked intruder, which the defendant is found to be. It is unnecessary, therefore, in this action, to determine whether or not the plaintiffs have acquired title from the paramount source, because it is conceded that the defendant has not. The maxim, *qui prior est tempore, potier est jure*, is applicable to this case.

"This doctrine has become so familiar to the bar of this State as to render any elaboration of it wholly unnecessary."

In the case of Brandt v. Wheaton, 52 Cal., 430, it is said:

"As against a mere trespasser, one in possession of a portion of public land will be presumed to be the owner, notwithstanding the circumstances that the Court has judicial notice that he is not the owner, but that the government is. This rule has been maintained from motives of public policy, and to secure the quiet enjoyment of possession which are intrusions upon the United States alone."

In the case of Webb v. Clarke, 74 Cal., p. 11, it was held:

"But it has been held in a long line of decisions that where a party enters under a color of title, and has actual possession of a part of the whole tract, he has constructive possession of the whole tract, described in the document. (Hicks v. Coleman, 25 Cal. 122; 85 Am. Dec., 103; Hoag v. Pierce, 28 Cal., 191; McKee v. Greene, 31 Cal., 420; Ayers v. Bensley, 32 Cal., 631; Russell v. Harris, 38 Cal., 426; 99 Am. Dec. 421; Donahue v. Gallavan, 43 Cal., 573; Spect v. Hager, 65 Cal. 443.) And it makes no difference that the grantor had neither title nor possession (Walsh v. Hill, 38 Cal., 487, 488), provided the document was not void on its face and the party entering under it believed in good faith that he acquired an interest under it. (Walsh v. Hill, 36 Cal. 487, 488; Cannon v. Union Lumber Co., 38 Cal., 674; Wolfskill v. Malajowich, 38 Cal., 281)."

In the case of Zilmer v. Gerichten, 111 Cal., 73, it was said:

"As above stated, the evidence for plaintiff tended to prove prior actual possession of the demanded premises by the

plaintiff. As against the defendants, who were alleged to be wrongfully in possession when the action was commenced—March 1, 1893—the prior possession of plaintiff was prima facie evidence of his title. (Morton v. Folger, 15 Cal., 275; Leonard v. Flynn, 89 Cal., 543; McGovern v. Mowry, 91 Cal., 383)."

It seems to be contended on the part of the plaintiffs in error that the mere possession of E. O. Miller and his associates was not subject to barter and sale, but was at best a mere license. This is not the rule in the State of California. In the case of Johnston v. Rickett, 5 Cal., 218, this language is used:

"There is no pretense on either side that there is title, and indeed the character of the estate—that of a mere naked possession of public lands—is set out in the contract upon which the plaintiff relies and makes part of his bill, and it follows that the only relief he seeks is consonant with the power of the defendant, that of a conveyance of what the defendant actually has, and nothing more—the enjoyment of the possession of the land according to the true intent and meaning of the contract. It has frequently been decided that lands held by no other tenure than possession may be the legitimate subjects of contract."

Upon the particular contention now under discussion Justice Henshaw, speaking for the Supreme Court of the State of California, said:

"It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an individual eighth interest in the whole. It further appears that certain

valuable rights become the property of such locators even before discovery. They have the right of possession against all intruders (Garthe vs. Hart, 73 Cal., 541) and they may defend this possession in the court (Richardson v. McNulty, 24 Cal., 339). They have, then, this right of possession and with it the right to protect their possession against all intrusion, and to work the land for the valuable minerals it is thought to contain.

"We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery. There is certainly nothing in the express law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. Thus the law expressly provides that if one of the co-locators abandons his claim or interest by refusing to bear his portion of the cost of the assessment work, such abandonment does not, as would be claimed, work the destruction of the whole location, 'but his interest in the claim shall become the property of his co-owners who have made the required expenditures.' (Rev. Stats., U. S., Sec. 2324).

"It is to be borne in mind that a location such as this though it contained 160 acres, is still a single location, a single claim, with undivided interests covering the whole of it.

"Any work done upon the claim is done for the benefit of all the co-locators. It is undisputed that when the location has once been perfected one of the associates may by conveyance acquire all of the rights of his fellows, and we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them. If, instead of conveying, the seven associates stood idle and refused to contribute their share to

the necessary work of developing, and Miller under these circumstances, had alone prosecuted the work to a successful discovery, no one could contend, in the face of Section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole 160 acres.

"If then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by refusal to join in the work, should effectuate any different result."

As we understand it, the precise question attempted now to be raised by the contention referred to is this: Assuming that Miller and others entered upon the land in controversy upon the date claimed, and that the land at the time was vacant and unappropriated land of the government of the United States, and barring the question of discovery, was in all respects subject to location as a placer mining claim, and that barring said question of discovery it was located by eight persons competent to make such locations, the notices posted and recorded and the boundaries properly marked and that no discovery of mineral or petroleum sufficient in law was made at the time of the location; that subsequent to the location and prior to an actual discovery of mineral the locators, other than the defendant in error, E. O. Miller, conveyed to said Miller, who held the entire title to the property in controversy in his own name for himself, and two or more other persons; the facts chronologically stated being (the dates are stated with only approximate regard for accuracy) that the notice was posted and the location made on the 31st day of December, 1896, and the locators and their successors

in interest have ever since remained in the actual and undisputed possession of the entire property except for the controversy in regard to title involved in this suit; that his co-locators conveyed to Miller about the last days of July, 1897; that Miller leased to the Home Oil Company, a corporation, about the month of September of the same year, and that said Home Oil Company immediately commenced to sink a well, and within that year discovered and developed a very large producing and paying oil well, and has since continued the development of the property and has expended very large sums of money thereon and developed numerous paying and extraordinarily productive wells thereon.

Under this state of facts the contention is made that the attempted location is invalid for any purpose prior to the actual discovery of mineral; that the effect of the conveyance of his co-locators to Miller before the discovery was that of an abandonment by them of their location of the property; that their conveyance to Miller was void except to the extent of its being an abandonment, and that there not being in existence at the time of the discovery eight qualified locators, that the discovery vested no title in Miller or his lessees, and from and after the date of the conveyance to Miller by his co-locators, (at least we assume that this is the contention) that the land was abandoned, unoccupied and subject to location by any other qualified locators and without a discovery the locators who had conveyed to Miller being eliminated from the consideration, vested no title or interest in any one, and that, therefore, the facts and circumstances considered there never has been a concurrence of qualified locators or a location and discovery of a valid placer mining claim, and that therefore the defendants in error have failed to prove title.

The record does not disclose that this question was ever raised by the plaintiffs in error in any of the courts of the State of California, and it further appears from the determined facts in the case that the entry of these plaintiffs in error was surreptitious upon the actual and bona fide possession of the defendants in error.

It is contended on the part of the plaintiffs in error that the location of E. O. Miller and his associates was invalid under any aspect of the case until oil had been actually developed. As we all concede that no discovery was ever made prior to that time, yet, the fact remains that the respective locations of the plaintiffs in error stand upon the same footing as they never, at any time, made any discovery of mineral within the boundaries of their alleged claims. It would seem therefore, that these plaintiffs in error have no such title as permits them to raise any question as to the title of the defendants in error. It would seem to us that these considerations are undisputed and are conclusive to the effect, that, tested by their own statements and arguments, the plaintiffs in error are mere trespassers and not entitled to dispute the title of the defendants in error, who are in the actual possession of the property.

The assumption that the locator of a mineral claim, or an association of eight persons locating a group of eight claims, are trespassers upon, and have no interest in, such mineral claim until the actual discovery of mineral, is far from sustained by the authorities. In fact, the contrary is amply sustained by all of the authorities upon this subject.

The exact nature and extent of such right or interest is, we assume, the only question open to serious discussion. We do not consider that the question of what does or does not constitute a sufficient discovery with relation to an oil claim

located under the placer mining laws, is here involved. We shall therefore not discuss the same. It is undoubtedly true, however, that the decisions in the department have clearly tended to establish its position to the effect that the existing and surrounding conditions where proven may be taken into consideration and that such being considered the conditions may amount to a discovery sufficient to justify the miner in the location of his claim and its further development in the absence of such actual and extensive discoveries within the boundaries of the claim as would be required in the location of a quartz claim and perhaps in the location of a gold placer.

We claim that one who enters upon a tract of the public lands of the United States, and puts up a notice claiming a given described tract, and then marks the boundaries of that tract so that they can be readily traced, and in the notice claims the tract under the mining laws, takes possession of it, and proceeds with work in developing it, though he may have made no discovery, has rights therein, and among those rights is the right to the possession of the tract as against all intruders.

It seems to be suggested that the parties posting and recording notice of location and marking the boundaries could not prevent the re-location by some one else; but turning to the Revised Statutes of the United States dealing with this question of acquiring titles to mineral lands, it will be seen that it is provided that "the locators of all mining locations heretofore made, or which shall hereafter be made on any mineral vein, lode or ledge situated on the public domain, their heirs and assigns * * * so long as they comply with the laws of the United States and with the state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive

right to possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, etc."

Revised Statutes, Sec. 2322.

We have now two other provisions of the Statute necessary to be noticed at this place. One is that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.

Ib. Sec. 2320.

The other, the location must be distinctly marked on the ground so that its boundaries can be readily seen.

Ib. Sec. 2324.

It is held everywhere that so far as the laws of the United States are concerned, nothing is required to make a complete and perfect location of a mining claim, except these two things; discovery and marking the boundaries on the ground so that they can be readily traced; but when those two things are done, the locator or locators have acquired the exclusive right of possession and enjoyment of all the surface included within the lines, and of all mines therein. This is not a right which exists against intruders alone; it is perfect and complete against the United States government, and so long as the locator performs the conditions upon which, under the laws of the United States, his title is to continue, it is good against the United States itself.

In Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, the court said:

"It follows that on the 19th day of December, 1876, the owner of the original location had, under the Acts of Congress, the exclusive right to the possession and enjoyment of the property in dispute. A mining claim *perfected under the law* is property in the highest sense of the term, which may

be bought, sold and conveyed, and which may be passed by descent. * * * * There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant of the United States."

See also Forbes v. Consolidated Virginia Mining Company, 94 U. S. 762, 26 L. ed. 313.

In Noyes v. Mantle et al. 127 U. S. 348, 32 L. ed. 168, a patent had been issued for a placer claim within the boundaries of which was a lode claim upon which a location had been made, including the discovery, and after stating the case, the court said:

"They had thus done all that was necessary under the law for the acquisition and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale. The location having been completed in April, 1878, antedates by some months the application of the defendant for a patent for his placer claim."

Then after setting out section 2322 of the Revised Statutes and referring to other cases which had been decided by the Supreme Court, construing that section, they said:

"That section can have no application to the lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States; and

are in possession of the locators or their assigns; for, as already said, such locations when perfected under the law are the property of the locators, or parties to whom the locators have conveyed their interest."

And after quoting from Belk v. Meagher, it is further said:

"It is therefore not further subject to the disposal of the government."

Now it is admitted on all hands that neither discovery, nor marking the boundaries alone, will vest this absolute right to exclusive possession which makes the surface and the mines beneath, the property of the locator, and withdraws them from disposition by the United States. It takes both of these things to accomplish this result; but it is submitted that it does not follow that one who has posted the notice and marked the boundaries and taken possession and entered upon the exploration and development of the mines supposed to be contained therein, has no rights which a mere intruder is bound to respect. The contrary has been repeatedly decided, and indeed it is but the application to public mineral lands of principles which had long before been determined with respect to agricultural lands.

In Atherton v. Fowler, 97 U. S. 513, 24 L. ed. 732, the court said:

"Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else." (Referring here to persons claiming under Vallejo, who had settled upon the lands and improved them and erected dwellings thereon, and then the court continued): "But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out

of their houses, seize their improvements, and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land; it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude."

The same doctrine has been declared in numerous other cases.

Hosmer v. Wallace, 97 U. S. 375 24 L. ed. 1130, 1132.
Quinby v. Conlan, 104 U. S. 220, 26 L. ed. 801.
Hosmer v. Duggan, 51 Cal. 170.
Brown v. Morris, 59 Cal. 64, 73.
Hambleton v. Duhain, 71 Cal. 136, 140.

The principle of these cases has been directly applied to the location of mineral lands.

Crossman v. Pendery, 8 Fed. 693.
Field et al. v. Gray et al., 26 Pac. 793.
Weise v. Barker, 2 Pac. 919.

We quote from that case the following passage:

"The record in that case shows actual possession of the

appellees, which is *prima facie* evidence of title; and as we said in Lebanon Company against Consolidated R. E. P. M. Co. 5 Colorado, 380, entering upon the premises in the *actual possession of another* for the purpose of performing the acts necessary to constitute location and possession, amount only to a trespass, and cannot form the base for the acquisition of title. Whether the location of Barker and his co-tenants be valid or not, their possession is sufficient to defeat an action to recover by the appellants."

As we have said already, marking the boundaries and making discovery are equally essential to this perfect or completed location, which gives in some sense, and in a very proper sense, a title. Now, if one has no rights at all under the Acts of Congress, until both things are done, it would appear that no state legislation could give him any; and yet many of the States of the Union have enacted laws in which they have provided in varying terms, that when one has made a discovery, he is protected in his possession against the whole world for some limited time, generally sixty days, sometimes ninety days, and sometimes even longer, in which to perfect and complete his location. A number of these acts will be found in the end of Vol. 2 of Lindley on Mines, commencing at page 1235.

The first act is that of Arizona, which, after providing for the notice of location, pages 1235 and 1236, and providing that before the location certificate is filed with the County Recorder, the discoverer shall locate his claim by first sinking a discovery shaft upon the premises, etc.; secondly, post at the point of discovery the notice substantially conforming to the location certificate; third, by marking the boundaries; provides in section 6 that the discoverer shall have ninety

days from the date of discovering the lode, and the posting of the notice thereon, to perform said discovery work thereon.

Ib. page 1237.

California had a statute upon this subject, enacted in 1897.

Statutes of 1897, page 215.

This required the discoverer to immediately erect at the point of discovery a substantial monument or mound of rocks, and post thereon a preliminary notice, stating what it contained. (Ib. 1243, 1244). Within sixty days from the date of discovery he was required to do certain work, and to file his notice in the County Recorder's office.

Ib. 1245, 1246.

Colorado had a similar law, 2 Lindley 1263, requiring the discoverer, within three months from the date of the discovery, to record his claim, and before filing such location certificate he was required to sink a discovery shaft; and by the 8th section he had sixty days from the time of uncovering, or disclosing a lode to sink a discovery shaft thereon.

Ib. 1263, 1265.

Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, all have laws quite similar, and all of which are contained in the work referred to. These laws have been uniformly upheld by the state courts and we know of no case in which their validity has been denied by a federal court.

The Colorado Act seems to be distinctly upheld by Judge Miller in Erhardt v. Boaro, 8 Fed. 692. In the course of his opinion in this case he said:

"The law of the State gives sixty days after making discovery of mineral in which to sink a shaft ten feet in depth. The main object of the sixty days' possession, it seems to the

court, must be to allow time to discover the course of the lode, in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days to hold his right must remain in continuous, actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the point of discovery, giving the name of the lode, date of discovery, and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise, the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake, with the notice thereon, as required, is equivalent to *actual possession* for the sixty days within which he may proceed to the next step, to-wit, sink the discovery shaft to the depth of ten feet, have survey made, mark the lines, and make formal location."

But we submit again that if the acts of Congress do necessarily negative the existence of any right at all in the locator, until his right is absolutely perfect, then these statutes could not confer any such right; but it has been universally admitted that they are valid and do protect the party during the time named, in the prosecution of the work to a completed and perfected location.

In Omar, et al. v. Soper, et al. 18 Pac. 443, the Supreme Court of Colorado had under consideration the Colorado statute, and in the course of the opinion the Chief Justice said:

"It is conceded that if the boundaries of the Golden Bell had been marked, no claim to any portion thereof could have been initiated until a forfeiture had occurred. To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim in order to

protect himself from the invasions and claims of any person learning of his find, would be an unreasonable, if not an impossible, requirement. An attempt to do so would result in many cases in leaving the main portion of the lode outside of the staked boundaries. The object of the statute in giving sixty days for sinking the discovery shaft was evidently to afford the miner time to sink his shaft and to ascertain the true course of his lode, when he would be qualified *to mark its boundaries on the surface.* * * * To hold that the claim is protected throughout its whole extent during this period, from invasion and adverse claims, by a notice which, in addition to the statutory requirements, shall specify the extent of the territory claimed along the vein on both sides of the point of discovery, is both reasonable and equitable. It is likewise consistent with the spirit and policy of the statute, and a construction which renders it effective. Such a notice properly made and posted is an appropriation of the territory specified therein for the period of sixty days. It has been repeatedly held that only the unappropriated mineral lands of the United States are open to exploration and location. No one can, therefore, lawfully enter upon the territory so claimed during the period named, for the purpose of initiating a claim thereto; and it necessarily and logically follows from an application of the same rule and principles, that no one during this period can stand outside such appropriated territory, and in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances."

In Richardson v. McNulty, 24 Cal. 339, 344, in speaking of the transfer made in that case, the court said:

"If the gift be complete * * * a transfer is the result,

which transfer as much precludes the idea of abandonment as a transfer resulting from a sale. No question of abandonment can arise where a transfer has been had by the act of two parties. To an abandonment of the character involved in this and all similar cases, there can be but one party. The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned, (and this is true of all the public mineral land of the State) was *publici juris* and open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law. He may sell it * * * or he may abandon it. In doing the latter he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event. * * * When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy, still exists, although vested in another, and the continuity of possession remains unbroken."

In the case just quoted from, referring to an instruction of the court that the plaintiffs in error being in actual possession, though without right, yet the defendants in error could not from that circumstance alone recover, because of the rule of the law that he must recover upon the strength of his own title, the court said:

"It is insisted that the present case differs from that of McGarrity v. Byington, because, as is claimed, it involves an outstanding title. There may be an attempt to raise a question of that kind, but under numerous decisions of the late Supreme Court, no such question can be made in an action of ejectment in which the plaintiff, as in the present case, relies absolutely upon prior possession, and the defendant fails to connect himself in any manner with the outstanding title. * * * In this case only a question of possession is involved. The naked prior possession of the plaintiff is pitted against the naked present possession of the defendants. Strict title is not involved. The doctrine that the plaintiff must recover upon the strength of his own title is applied to cases where the strict legal title in contradistinction to a mere possession is involved. In such a case the defendant may defeat the legal title relied upon by the plaintiff by showing the true legal title to be in a third person, but where mere prior possession is relied on and the defendant is a mere intruder, he cannot justify his act by showing the true title to be outstanding."

Here is a distinct recognition of the right to maintain an action in ejectment to recover a mining claim upon possession merely, and we think that this doctrine has the sanction of the Congress of the United States.

Revised Statutes, Sec. 910.

These cases, too, have, as we think, been approved and confirmed by the recent decision of the United States Circuit Court of Appeals, on the Cosmos Exploration Co. v. Gray Eagle Oil Co., and Pacific Land Improvement Co. v. Elwood Oil Co., 112 Fed. Rep. 4, 14-18. We submit, therefore, that the defendants' in error right to recover in this action is

established, wholly independent of any other question, other than that of the prior and actual possession.

In Stark v. Barnes, 4 Cal., 412, where the defendant sought to defend his right under the act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States, and where it appeared that one Morrison had taken up a claim adjoining the land, and which he supposed included this part, but when he had marked off his claim, found the portion in dispute was left out; and it remained unoccupied until Stark entered upon it in October, 1850,—the Court said, that notwithstanding the fact that several persons were in the habit of cutting fire wood from it, the land was, within the meaning of the statute, unoccupied at the time of Stark's entry. He had erected a house upon the land, which was soon afterwards torn down, but immediately afterwards rebuilt, and he continued to occupy it until the time of the trial, and proceeded step by step to perfect his claim, which, in the month of February following, he marked out, so that the boundaries might be readily traced and its extent easily known; but before completing the series of acts necessary to perfect his claim, he was disturbed in his possession by Morrison, who entered upon the land, commenced building a house, and having completed it, conveyed it to Barnes, the appellant, who as his successor resided upon it and continued to do so until the trial of the case. They further said that this action of Morrison, though commenced in the afternoon of the same day that Stark entered upon the land, was trespass upon the possessory rights of Stark, and could in no way bestow any right of possession upon the trespasser; that Barnes, taking under him, was but his successor in the trespass, and became himself a trespasser. It was contended by the appellant that Stark had no possession

within the meaning of the statute, and this was based upon the ground that he had not perfected his claim by the performance of such acts as are required by law; but the court said:

"We consider that this is a case to which the doctrine of relation applies. The doctrine is correctly stated by the court below, and where a number of acts are to be performed in virtue of which a right accrues, the time of performance of the last act, when all have been performed in good faith, relates back to the commencement of the series of acts which create the right, so as to make it perfect when the first act was being commenced."

"* * * * * * The object of the act being to encourage the settlement and cultivation of unoccupied lands and securing the actual settler in good faith in his possession and improvements, would be frustrated if while one party was engaged in the performance of the first of a series of acts necessary to be done to entitle him to the benefit of the statute, and before the completion of those acts requiring time and labor, a second party could by force thrust him aside, occupy his claim, and be secure in the possession thereof, on the ground that the claimant first entering upon the land had not completed all the acts that the statute requires before the entry of his disturber; such a construction, instead of accomplishing the great design and purpose of the law, would be to permit wrong, violence and public mischief, and ought nowhere to receive encouragement. It cannot receive the sanction of this court."

In Garthe v. Hart, 73 Cal. 541, which was a controversy in regard to a mining claim, the court, after saying that the plaintiff gave evidence of an attempted location in 1897, and acts tending to show possession, and after the court had

struck out all the evidence of this location, for the reason that it appeared that the same had not been made in compliance with law, and after saying that this order must have been directed to the location merely and not to the possession, because the fact that the location had not been made according to law, was not sufficient to exclude evidence of the possession,—then said;

"Without saying whether the acts done were sufficient to constitute a possession, we think the court erred in its charge to the jury with reference to it. The charge was as follows: 'In order to make a valid location of mining claims, the locator may adopt one of two courses. He may determine to locate his claim in accordance with law and customs. In order to get a title, a possessory title, in this way he must conform to the requirements of law. As I said, there is still another way by which a miner in this state may acquire a right to the possession of a piece of mining ground. It is *by taking possession of it and clearly defining the boundaries so that they may be readily traced, and holding such possession, keeping such possession.*'"

This ends the quotation from the charge to the jury, and the italics are those of the opinion of the court; and the court added:

"In the hurry of the trial, the learned judge evidently overlooked the distinction between the right of a party in possession as against mere intruders, and his right as against one who has complied with the mining laws. Possession is good against intruders * * * * but it is not good as against one who has complied with the mining laws. * * * "

If there be any question of the right to maintain the action upon possession alone, it is submitted that under the

facts in this case that there was a valid mining location complete, perfect, vesting in the defendants in error that right to the exclusive possession required by the statute. The findings show that a proper notice was posted and recorded, boundaries marked and discovery made. But leaving out of sight now, the question of the discovery made by the plaintiffs in error and the intervenor, it is, as we understand it, claimed that in some way or other the transfer of seven of these locators to Miller before discovery, operated to defeat the right of Miller to perfect location by discovery.

In Doe v. Waterloo Mining Company, 70 Fed. 455, it was claimed by the appellants that the Newbill right was abandoned, because he allowed Parker, Wallace and Farrell to become joint locators with him. But the court said:

"There was no intention on his part to abandon his rights. Certainly the contrary appears in his contract with these parties. Abandonment rests, as a rule, in intention. Newbill at the time he made his contract with Parker, Wallace and Farrell had *only the right to make a location of a claim on account of his discovery of a mineral bearing vein containing gold.* There was no rule of law that prevented his making a verbal transfer of his right. Until the statute of California provided otherwise, a mining claim could be transferred by parol or verbal conveyance, accompanied by a change of possession of the premises * * * * *The mere right then to locate a mining claim*, could certainly be so conveyed in the absence of any statutory law. When such a transfer was made there was no objection to the parties making the purchase joining in the location."

There is then, nothing in the mere nature of the transaction of a sale of an interest, or part of an interest, in a right to

locate, or in the location itself, that is contrary to any provisions of the statute.

In Neuebaumer v. Woodman, 89 Cal. 310, 314, 315, the court said:

"The evidence shows that the defendant did not take the necessary steps to locate the mine, nor did the plaintiffs nor their grantors under section 2324 of the Revised Statutes of the United States. The point to be considered, then, is, whether the plaintiffs, or their grantors, were in the actual possession of the claim, and had not abandoned it at the time of the ouster."

The court here then considers what is shown by the evidence, and adds:

"Tucker certainly had possession, after his purchase through William Jones, of a part of the claim, and made a deed of the whole of it to William T. Jones, through whom the plaintiffs claim as their immediate grantor. Tucker had possession of a part, claiming the whole described by metes and bounds, through his deed from William Jones. Thus claiming the whole, he made a conveyance of it by metes and bounds to William T. Jones, and the last immediately entered into possession claiming the whole. This possession was continued in the respondents. This would give them the constructive possession of the whole tract, as against a mere intruder, as the court finds the defendant to be."

We say then that the right whatever it may be, of one who has only begun the location of a mining claim, to transfer his right to locate it, is not in itself objectionable; and that he can transmit to that successor whatever rights he himself has.

But, as we understand it, what is here objected is that if eight locate, by marking the boundaries, and before discovery seven convey to the eighth, there is some rule of public policy, or something in the United States statutes, to indicate that a discovery made by this eighth to whom the conveyance is made, would not give any valid claim to the mine, because it would in effect amount to a location by one person of the 160 acres, which is deemed by them in some way or other contrary to the public policy. But we apprehend that one who asserts an act to be contrary to public policy, must discover the existence of that policy in the statutes or the decisions of the courts passing upon statutes. And where is that public policy to be found in the Acts of Congress concerning the disposition of mineral lands? The injustice of the rule contended for is sufficiently obvious. Suppose eight persons locate by posting a notice and marking the boundaries of 160 acres of land, according to the government survey, thereby making it practically one claim, one location, and requiring but one discovery. They immediately enter upon the possession, and proceed at great cost and expense to explore this land for oil. To bore a well and to develop the petroleum products therein will cost anywhere from $2500.00 to $10,000.00, and some times even more than that. Now, after boring a depth of a thousand or fifteen hundred feet, at an expense of seven or eight thousand dollars, one of these parties became tired and says: "I intend to quit," and he does either abandon his interest by going away without the intention to return, or by conveying to the seven others and walking out. Can he by this means defeat the right of all the remainder, and if one cannot do so, could seven of them accomplish that result? If an intruder upon this possession, who should make a location and discovery, consisting of peer-

ing into this very well bored at the expense of the first locator, could acquire a better right, it would mean practically that the whole claim of one hundred and sixty acres could be bought out by buying out one undivided eighth interest only. But if one person cannot defeat the rights of his co-locators, neither can seven defeat the right of the eighth. And now what reason is there to believe that the Congress of the United States intended by this limitation in regard to the location of claims, to work out any such result? It certainly is not so expressly declared in the statute. The contrary seems to be plainly implied.

Section 2330, Revised Statutes, treating of placer mines, says:

"Legal subdivisions of forty acres may be subdivided into ten acre tracts and two or more persons or associations of persons having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, and no location of a placer claim made after the 9th day of July, 1870, shall exceed one hundred and sixty acres, *for any one person or association of persons*, which location shall conform to the United States surveys.

Section 2321. "Where placer claims are upon surveyed lands and conform to the legal subdivision, no further survey or plat shall be required * * * * * and no such location shall include *more than twenty acres for each individual claimant.*"

Taking the two provisions together, the meaning would seem to be not to limit the right of the individual to a particular twenty acre tract, but that the entire location should not include more than twenty acres for each individual claimant. So that in the location of this one hundred and sixty acres

by the joint act of the eight persons, there was no violation of the statute. And if the action of a single individual of the eight can affect the claims of the others at all, it must be by putting an end to all right, since there is no particular tract which he forfeits or grants away, but an eighth interest in the whole.

Now that this is not contemplated by the acts of Congress, and the fact that the remainder go on and perfect their title and obtain patent, is not a thing condemned by Congress, is shown by the act itself; for that act provides:

"That upon the failure of any one of the several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements, may at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure * * * * his interest in the claim shall become the property of his co-owners who have made the required expenditures."

Revised Statutes, Section 2324.

It is manifest that this provision is not limited to *one* who fails, but if one after another, or seven in the first instance, fail to put in their proportion of the expenses, after the notice given by the one, and the lapse of time thereby prescribed, he becomes the owner of their interests, and being the owner can proceed to obtain the patent for the entire one hundred and sixty acres. It is true that it may be said that he must first make a discovery; but that has nothing to do with the present question of the policy of this statute to limit

one person to twenty acres. It does nothing of the kind. It so limits the location in the first instance, but when the location is made and there is no evidence of fraud, no bad faith is to be imputed to any of them, the statute does not set its face against one only of them acquiring the title ultimately from the United States, by means of a patent; and if one only can proceed to the extent of obtaining a patent, why can he not proceed to the extent of perfecting the location and thereby becoming entitled to the exclusive possession.

If when the location is once perfected, one party may acquire the entire interest of his associates, and obtain a patent from the United States for that entire interest, why is it not equally true that this right to locate, vested in the eight persons, may be succeeded by one, two, or half a dozen of them, and the location perfected by them? If there is any reason, it is not to be found in public policy, because no such public policy can be found in the statute; but, on the contrary, the statute itself provides for a case in which one only, or any number less than all, may acquire the whole.

The plaintiffs in error, as we have said several times, have no discovery. No one has acquired title from the government, and no one is entitled to acquire it unless the defendants in error are. And we submit that under such circumstances, the action of the defendants in error and their predecessors is not so completely a nullity as that no rights of any kind either did, or could, vest.

The claim that the deed of these associates of Miller operated as an abandonment of the mine, is distinctly refuted by the case in the 24th California Reports already cited. Abandonment is the act of one person. It is the vacation of possession, occupancy, without any intention to return to it. It cannot take effect by operation of a transfer in writing made

by one person to another. Besides that, nothing is gained by calling it abandonment. If these persons had nothing to convey, they had nothing to abandon. Abandonment does not take place until there is some right to abandon.

If of the eight locators, seven had simply done nothing, and the eighth proceeded as he did to develop the mine, and had made the discovery which he did, there would be no question, could be none, made by any person to his right. Does he lose all right to perfect the claim because he does the same thing after a conveyance is made to him? We have here these decisions that one in actual possession, before discovery, can maintain that possession against all persons except the United States. If he can keep off all intruders and can by the processes of the judicial tribunals of the country, restrain any person from interfering with him, what is the objection to his making a discovery and completing the acts by which the right to this exclusive possession is vested in him?

There was such a relation between them before the transfer, as that the discovery by one would have enured to the benefit of all; and it is submitted that the transfer of the rights of one or more of them and his associates, does not prevent that act from having the same effect. The only difference between one, who has marked his boundaries, gone into possession, and is availing himself of the license of the United States government to occupy that particular tract for the purpose of exploring it for mineral, but who has not yet discovered the mine,—and one who has done these things and superadded the discovery, is, that, in the latter case, the right has become good against the world, including the government of the United States, and the title has vested. It does not depend upon the actual possession of the property; while

in the other case, the title acquired by possession depends upon the continuance of that possession. This being so, suppose it were true that some policy of the government forbade one from acquiring the interest of all, and then obtaining the patent from the United States; who can avail themselves of this principle? Can a mere intruder? An alien is not by the law permitted to make a location or to enter upon the public lands for the purpose of locating mines or working the same; but it has been repeatedly decided that where an alien has done so, nobody can take advantage of the statute except the government of the United States. His associates cannot oust him; another cannot enter upon his possession and make a location, and deprive him of his rights.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532.

Billings v. Aspen Milling & Smelting Co., 51 Fed. 338, 52 Fed. 250.

O'Reilly v. Campbell, 116 U. S. 418.

Tornanses v. Melsing, 109 Fed. 710-712.

(c) That this court has no jurisdiction to hear or determine this controversy for the reason that no Federal question was ever specially set up or claimed by these plaintiffs in error in the courts of the State of California, and that the decision of the Supreme Court of the State of California was based upon a ground which did not involve a Federal question, and which was broad enough to support the judgment.

Our views upon this proposition are fully set forth in our printed motion on file herein to dismiss, or affirm, this writ of error, and the printed brief in support thereof, to which we most respectfully refer this court for a consideration of all the phases of this question.

We believe we have established, from the record in this case, and the authorities, that, both upon the merits and upon the law, the writ of error should be dismissed or affirmed, and that the decision of the Supreme Court of the State of California in this litigation was right, both upon the law and the facts, and that, as against these plaintiffs in error, the defendants in error, whom we represent, are entitled to a decision of this court, making final and conclusive the decision of the Supreme Court of the State of California.

Respectfully submitted,

L. L. CORY,

Attorney and Counsel for Defendants in Error.